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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WESTERN ELECTRIC COMPANY, INC.,
Petitioner,

v.

OLLIE T. HILL, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the named plaintiffs' failure to satisfy the requirements of Rule 23 of the Federal Rules of Civil Procedure for commonality, typicality, membership in the class and adequacy of representation creates merely "technical" or "formal" defects which are cured by the named plaintiffs' success on the merits of claims they had no authority to litigate, so as to permit reinstatement of erroneously entered class findings upon post-remand intervention by allegedly qualified new class representatives?

2. Whether the Court of Appeals erred, as a matter of law, in instructing the district court to consider reinstating findings of fact and conclusions of law that were erroneously made and were vacated for want of proper jurisdiction in a prior appeal in the same litigation?

3. Whether the determination of a district court that permissive intervention by alleged applicants for employment, five years after the litigation began, would have substantially delayed further proceedings to the prejudice of the original parties to the litigation, may be set aside solely because it was contrary to the "general experience" of the Court of Appeals?

PARTIES INVOLVED

Petitioner Western Electric Company, Inc.*

Named plaintiffs Ollie T. Hill, John W. Ward, Charles R. Merriweather, Edward H. Minatee, Minnie M. Marable, and Mary E. Carter.

The class of all black persons and all female persons employed by Western Electric Company, Inc. at its facilities in Arlington, Virginia.

Proposed Intervenors Betty Bailey, Victor L. Furr, III, Darlene Johnson, and the proposed class of all blacks and all women who unsuccessfully sought employment at the Petitioner's facilities in Arlington, Virginia.

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* Western Electric Company, Incorporated is a wholly-owned subsidiary of American Telephone and Telegraph Company. Subsidiaries of Western Electric are Manufacturers' Junction Railway Company, Nassau Recycle Corporation, Sandia Corporation, Teletype Corporation and Western Electric Company, Limited (London). Fifty percent of the voting securities of Bell Telephone Laboratories is owned by Western Electric with the remaining fifty percent owned by AT&T. Western Electric also is the owner of forty-four percent of Goldstar Semiconductor Ltd., a joint venture.

Other subsidiaries and affiliates of American Telephone and Telegraph Company are set forth below:

New England Telephone and Telegraph Company

New York Telephone Company

Empire City Subway Company (Limited)

New Jersey Bell Telephone Company

The Bell Telephone Company of Pennsylvania

The Diamond State Telephone Company

The Chesapeake and Potomac Telephone Company

The Chesapeake and Potomac Telephone Company of Maryland

The Chesapeake and Potomac Telephone Company of Virginia

The Chesapeake and Potomac Telephone Company
of West Virginia
Southern Bell Telephone and Telegraph Company
South Central Bell Telephone Company
The Ohio Bell Telephone Company
Michigan Bell Telephone Company
Indiana Bell Telephone Company, Incorporated
Wisconsin Telephone Company
Illinois Bell Telephone Company
Northwestern Bell Telephone Company
Southwestern Bell Telephone Company
Southwestern Redevelopment Corporation
The Mountain States Telephone and Telegraph Company
Malheur Home Telephone Company
Pacific Northwest Bell Telephone Company
The Pacific Telephone and Telegraph Company
Bell Telephone Company of Nevada
Eastern Telephone and Telegraph Company
Transoceanic Communications, Incorporated
Transoceanic Cable Ship Company, Inc.
Transpacific Communications, Incorporated
195 Broadway Corporation
AT&T International Inc.
AT&T International United Kingdom—Limited
American Bell Inc., Services
Western Electric International, Incorporated
AT&T International Far East, Limited
Advanced Mobile Phone Service, Inc.
American Bell Inc.
American Telephone and Telegraph Overseas Finance N.V.
The Southern New England Telephone Company
Cincinnati Bell, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Western Electric Company, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit entered on March 1, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals dated March 1, 1982, is reported at 672 F.2d 381 (1982), and is reproduced at App. 1a-37a. The order entered on May 28, 1982, denying rehearing *en banc* by a vote of 6-4, is set out at App. 39a. The opinion of the district court in this matter is not reported, and is reproduced at Appendix 40a-41a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on March 1, 1982. App. 38a. A petition for rehearing, and a suggestion for rehearing *en banc*, was timely filed, and was denied, over the dissent of four of the ten circuit judges, on May 28, 1982. App. 39a. On August 12, 1982,

by order of Chief Justice Burger, the time for filing this petition was extended to September 7, 1982. Jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The justiciability requirement of Article III of the United States Constitution and relevant portions of Rules 23 and 24 of the Federal Rules of Civil Procedure are set forth at App. 43a-44a.

STATEMENT OF THE CASE

This lawsuit was instituted more than seven years ago, on May 14, 1975. The named plaintiffs [1] were six present and former employees of petitioner Western Electric Company, Inc., ("Western" or "Western Electric") who worked at two separate facilities in Arlington, Virginia. The complaint was filed as a class action on behalf of present and former employees and rejected applicants, even though none of the named plaintiffs had been rejected for employment by Western Electric. The complaint alleged race and sex discrimination in hiring, job assignments, and promotions at the two Arlington facilities.[2]

At a class certification hearing on October 31, 1975, based upon Western's arguments and the express representations by the named plaintiffs that none had ever been a rejected applicant, the district court certified a class that excluded rejected applicants. On November 14, 1975, without hearing further evidence or conducting a "rigorous analysis" of Rule 23's requirements, the district court *sua sponte* reversed itself and certified a class of black and female persons that included rejected appli-

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[1] Because there are two groups of respondents in this case, they are referred to by their status in the case (*i.e.*, either as "named plaintiffs" or "intervenors") rather than as "respondents."

[2] The action was brought under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, and jurisdiction was premised on 28 U.S.C. § 1343(4) and 42 U.S.C. § 2000e-5(f)(3).

cants.[3] After a three-day trial on the merits in February 1976, the district court issued a memorandum opinion sustaining claims of discrimination in hiring, promotion, and job assignments.

On appeal, the Fourth Circuit unanimously reversed the class certification entered by the district court and vacated the findings of discrimination in hiring. 596 F.2d 99, 101-02, *cert. denied*, 444 U.S. 929 (1979) ("*Hill I*"). Relying on *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977), the court held that the interests of the named plaintiffs were so different from the interests of rejected applicants "that the named plaintiffs [could] not properly maintain an action for redress of alleged discrimination in hiring." 596 F.2d at 102. The hiring findings were vacated because certification of the class to include applicants "was in error," *id.*, and the district court had "improperly considered" the hiring claims raised by the employee plaintiffs. *Id.* at 101. The court did not reach the merits of the hiring issues. As to those employee claims that were properly raised in the litigation, the Fourth Circuit reversed virtually all of the findings of discrimination in employment entered by the district court. *Id.* at 102-07.[4]

On January 17, 1980, more than nine months after the Fourth Circuit's decision in *Hill I* and nearly five years

[3] In a letter to counsel, the district court explained that its reversal was based on a "closer reading" of *Barnett v. W.T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975). On appeal in *Hill I*, as discussed below, the Fourth Circuit determined that the district court erred by construing *Barnett* too broadly, and overruled *Barnett* as inconsistent with the decision of this Court in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977).

[4] The named plaintiffs petitioned the Fourth Circuit for a rehearing *en banc*, arguing, *inter alia*, that rehearing was warranted because the panel in *Hill I* failed to order that the record on hiring be held open to allow for post-remand intervention. This petition was denied without opinion on May 29, 1979. Plaintiffs' petition to this Court for a writ of certiorari was denied on October 29, 1979. 444 U.S. 929 (1979).

after the lawsuit began, three alleged applicants moved for permissive intervention in this lawsuit.[5] These applicants, represented by counsel for the original named plaintiffs, sought both certification as named representatives of a class of rejected applicants and reinstatement of the vacated hiring findings. After briefing and oral argument, the district court denied their motion. The district court held that the motion to intervene was untimely, and further found that the proposed intervention would unduly delay the litigation and prejudice the original parties. The district court determined that, in the circumstances of the case, it would be impractical to consider the intervenors' claims while simultaneously proceeding with the remedial phase of the original case.

Thereafter, the named plaintiffs and Western negotiated a consent decree settling all remaining matters with regard to present and former employees. The district court approved and entered the consent decree after a full hearing. No settlement of the hiring claims was reached, and both the named plaintiffs and the would-be intervenors appealed from the district court's decision denying intervention. On December 30, 1981, the district court entered a final order dismissing all claims and ending the litigation, with the exception of matters then on appeal before the Fourth Circuit.

On March 1, 1982, almost seven years after this litigation commenced, three years after the findings of hiring discrimination were vacated, and three months after all claims raised by the named plaintiffs on behalf of the class they were entitled to represent were dismissed with prejudice, a new panel of the Fourth Circuit, over the lengthy dissent of Judge Widener, vacated the interven-

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[5] One of the purported intervenors alleged that she sought work at one of Western's Arlington facilities in 1972 and 1973. The other two purported intervenors alleged that they first sought work with Petitioner in 1979, more than three years after the trial on the merits, at a different Western facility located in Landover, Maryland.

tion decision of the district court and remanded the case for further proceedings. 672 F.2d 381 (1982) ("*Hill II*"), App. 1a-37a.

Judge Phillips, writing for himself and District Judge Williams sitting by designation, first rejected the trial court's ruling that the motion for permissive intervention was untimely, and that intervention was impractical and would prejudice the rights of the existing litigants.[6] The majority opinion then held that the district court, in determining the propriety of permissive intervention, had failed to consider judicial economies that could be generated through intervention and reinstatement of the unreviewed class findings of hiring discrimination that had been vacated in *Hill I*. 672 F.2d 387, App. 9a.[7]

According to the majority, reinstatement of the vacated findings was possible because the holding in *Hill I* "was based entirely upon the *formal* lack of sufficient identity of interests between any class representatives and the non-hired members of the class." 672 F.2d at 391, App. 15a-16a (emphasis added). This "formal" lack of identity, according to the majority, created only a "technical" lack of adequate representation under Rule 23(a)(4). *Id.* at 389, App. 12a. Throughout its opinion, the majority stressed that this "technical" flaw was over-

[6] The majority opinion nonetheless recognized that additional litigation, delays, and prejudice would result from intervention, *see* 672 F.2d at 386-87, App. 7a-8a, but concluded that such prejudice "was given greater weight [by the district court] than *general experience warrants*." Id. at 387, App. 8a (emphasis added). In dissent, Judge Widener argued against reversal, on such theoretical grounds, of "an experienced trial judge who is intimately familiar with five years of extended litigation." *Id.* at 392, App. 19a.

[7] The majority in *Hill II*, like the court in *Hill I*, did not review the merits of the original hiring findings in considering the reinstatement issue. The reinstatement inquiry thus hinges upon findings that have never been reviewed, that were made in conjunction with several other findings on the merits that were reversed, and that predate by several years drastic changes decreed by this Court in the conduct of employment discrimination litigation.

come by the named plaintiffs' victory on the merits of the hiring issues, which allegedly proved that applicants were adequately represented during the litigation. The majority never addressed the commonality or typicality requirements of Rule 23(a)(2) or (a)(3), nor the more general Rule 23 requirement enunciated in *Rodriguez* that the named plaintiffs must be members of the class they seek to represent, nor did the court explain how purported success on the merits might cure these fundamental defects. Rather, the majority held that so long as class representatives (unqualified under *Hill I* and *Rodriguez*) prevail on the merits of overly broad class claims, fundamental defects in class composition and representation are only "formal" or "technical" matters, and findings previously vacated as outside the scope of the litigation can be reinstated through intervention of new class representatives. Judge Widener dissented from the majority opinion, concluding that it "trivialize[d] both *Hill I* and *Rodriguez* by [its] necessary implication that class composition is of little or no importance in Title VII litigation." 672 F.2d at 397, App. 28a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE HOLDINGS OF THIS COURT IN *EAST TEXAS MOTOR FREIGHT SYSTEM, INC. v. RODRIGUEZ* AND *GENERAL TELEPHONE CO. OF THE SOUTHWEST v. FALCON*, CONFLICTS WITH DECISIONS OF SEVERAL CIRCUITS, AND PRESENTS AN UNRESOLVED CONFLICT WITHIN THE FOURTH CIRCUIT.

The critical flaw in the decision below, and the most important reason why this Court should grant this writ, is the panel's holding that the lack of applicants among the named plaintiffs in this lawsuit created only a "technical" or "formal" defect in class composition and representation. In arriving at this conclusion, the court below completely ignored three vital factors—commonality, typicality, and membership by the named plaintiffs in

the class—that are called into question where, as here, none of the named plaintiffs suffered the same injury as, or were members of, the class they sought to represent. By ignoring these defects and improperly characterizing the error in the original trial solely as a matter of inadequate representation, the majority below was able to find that all "technical" defects in class composition and representation were cured through the success of the named plaintiffs on the merits of the hiring claims, and that the unreviewed prior hiring findings might be reinstated. The possibility of reinstatement, and the judicial economy the majority below envisioned as flowing therefrom, is the linchpin of the Fourth Circuit's ruling that the lower court erred in denying intervention, and is the primary focus of the remand instructions.[8]

The panel reached this decision without the benefit of this Court's ruling in *General Telephone Co. of the Southwest v. Falcon*, 102 S. Ct. 2364 (1982),[9] and by misconstruing the holding of *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977). The opinion below is in direct conflict with these holdings, as well as the holdings of at least three circuit courts (discussed *infra* at pp. 11-13) on this issue.

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[8] 672 F.2d at 387-92, App. 15a-17a. Because the opinion below plainly found that the possibility of reinstatement was a vital factor not properly considered by the district court, and which had to be decided on remand in order to determine the propriety of granting intervention, this case is now ripe for review by this Court. No subsequent proceedings in the lower courts can rectify this fundamental error of law by the Fourth Circuit, as this error is the very cause of all further action in this case. Had the court below properly applied established law, as discussed *infra*, it would have ruled that reinstatement of the hiring findings was improper and thus would have had no basis for overturning the district court or ordering the convoluted inquiry now required on remand. This key error underlies all further proceedings in this matter, cannot be remedied by the courts below, and should be rectified by this Court now.

[9] *Falcon* was decided approximately three months after the decision in this case.

The holding in this case also presents a further example of the unresolved conflict within the Fourth Circuit regarding the proper requirements for class litigation. Last term, in light of this conflict and this Court's decision in *Falcon*, this Court granted certiorari in *Brown v. Eckerd Drugs, Inc.* and vacated and remanded that case for further consideration in light of *Falcon*. 102 S. Ct. 2952 (1982), *vacating and remanding* 663 F.2d 1268 (4th Cir. 1981). The present case is a sister case to *Brown* and rests on precisely the same doctrinal footing. This Court should grant certiorari in this case and entertain full argument, or, as in *Brown*, vacate and remand for further consideration in light of *Falcon*.[10]

A. The Decision Below Seriously Misconstrues *Rodriquez* and Contradicts *Falcon*.

In *East Texas Motor Freight System, Inc. v. Rodriguez*,[11] and in the recent holding in *General Telephone Co. of the Southwest v. Falcon*, this Court exercised its supervisory power to insure that employment discrimination class actions are maintained only by named plaintiffs who are members of a proper class, defined in strict accordance

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[10] If this Court vacates and remands this case, petitioner suggests that because of the continuing internal conflict within the Fourth Circuit, it would be appropriate and desirable that the remand be directed before the circuit *en banc*. *See, e.g., CAB v. American Air Transport, Inc.*, 344 U.S. 4, 5 (1952); *United States ex rel. Robinson v. Johnston*, 316 U.S. 649 (1942) (per curiam); R. Stern & E. Gressman, *Supreme Court Practice* 366 (5th ed. 1978).

[11] *Rodriguez* was one of three cases decided on the same day which, taken together, clarified and simplified several aspects of class action proceedings under Title VII. The other two cases in this trilogy were *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and *United Air Lines, Inc. v. Evans*, 431 U.S. 553 (1977). As discussed *infra* at 19-20, the practical effect of the opinion below is to circumvent the standards set forth in this trilogy.

with all of the prerequisites of Rule 23. The holding in *Rodriguez* thus stated that named plaintiffs who are not members of the class they seek to represent do not " 'possess the same interest and suffer the same injury' as the class members . . . [and] simply [are] not eligible to represent a class of persons who did allegedly suffer injury." 431 U.S. at 403-04 (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974)). And in *Falcon*, Justice Stevens, writing for the Court, held that present and former employees cannot maintain class litigation on behalf of rejected applicants without establishing "after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." 102 S. Ct. at 2373. This Court in *Falcon* based its ruling on the commonality and typicality requirements of Rule 23(a)(2) and (a)(3), and distinguished the interests they serve from the adequacy requirement of Rule 23(a)(4). Moreover, Justice Stevens explicitly rejected the argument that success by the named plaintiff could "bridge [the] gap" and establish commonality and typicality for class claims as well. *Id.* at 2371-72.

The majority opinion below stands in irreconcilable conflict with the holding in *Rodriguez* that named plaintiffs must be members of the class they seek to represent. None of the named plaintiffs in this case was a member of the class of rejected applicants, yet the majority opinion in *Hill II* found reinstatement possible without even mentioning this fatal flaw. The holding below even more clearly conflicts with this Court's ruling in *Falcon*. The claims of the employee-plaintiffs in this case, like the claims of the plaintiff in *Falcon*, were directed at discriminatory treatment of employees and lacked any "typicality and commonality relationship" with the hiring claims premised on disparate impact upon applicants. As with class membership, the panel opinion sanctioned the possibility of reinstatement without even addressing these two key concerns.

The opinion below, by deliberately ignoring the vital issues of commonality, typicality, and class membership, stands in glaring contrast to this Court's admonition in *Falcon* that a "rigorous analysis" of the prerequisites of Rule 23 is mandatory in employment discrimination class actions, as well as this Court's statement in *Rodriguez* that "careful attention to the requirements of Fed. Rule Civ. Prac. 23 remains . . . indispensable." 431 U.S. at 405.

This Court has already granted review of a Fourth Circuit case that similarly misread *Rodriguez*, and was decided without the benefit of *Falcon*. In *Brown v. Eckerd Drugs, Inc.*, this Court vacated and remanded the decision of the Fourth Circuit for further consideration in light of *Falcon*. 102 S. Ct. 2952 (1982). Both *Hill II* and *Brown*, cases argued within three months of each other and in which the opinions were prepared concurrently,[12] share markedly similar facts,[13] and rest on the same doctrinal footing: that class membership, commonality, and typicality are unimportant in employment discrimination class actions. Neither case was decided with appreciation of the need for "rigorous analysis that the prerequisites of Rule 23(a) have been satisfied." *Falcon*, 102 S. Ct. at 2373. In *Brown*, this disregard for the totality of Rule 23 was manifested in the majority's holding that all minority employees have an interest in a workplace free of employment discrimination, whether or not the named plaintiffs were injured in the same fashion as members of the class sought to be represented. 663 F.2d at 1275. In his

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[12] *See* 663 F.2d at 1296 (Russell, J. dissenting); *and see Abron v. Black & Decker (U.S.) Inc.*, 654 F.2d 951, 974 n.18 (4th Cir. 1981).

[13] *Brown* and *Hill II* both involved situations where named plaintiffs were improperly permitted to litigate overly broad class claims. As in *Hill II*, *Brown* also involved post-trial intervention by a party for purposes of preserving favorable findings of fact made on behalf of an improperly certified class. *See* 663 F.2d at 1268, 1293-94.

dissent in *Brown*, Circuit Judge Russell observed that the majority had tacitly overturned *Hill I* and ignored *Rodriguez*, and had proceeded from the assumption that so long as named plaintiffs prevailed on the merits of class claims errors in the certification process were irrelevant. *Id.* at 1297. That erroneous premise became the holding in *Hill II*.

By vacating and remanding *Brown*, this Court clearly rejected the central premise underlying *Hill II*. As in *Brown*, this petition should be granted to ensure uniformity with the requirements of Rule 23 as construed by this Court.[14]

B. The Decision Below Conflicts with Established Authority in Other Circuits.

The Fourth Circuit's holding below—that success on the merits magically cures all defects in class composition and representation, and thus permits reinstatement of unreviewed findings on issues not properly litigated—has been squarely rejected by other circuit courts facing the issue. In *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982), the Fifth Circuit refused to find that defects in class representation were "cured" by the named plaintiffs' success on the merits. The Fifth Circuit

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[14] *See* S. Ct. R. 17.1(c). Indeed, if *Hill II* was consistent with this Court's view of class actions, the success of the class representatives in *Brown* should have been determinative of their qualifications as class representatives, and *Brown* should not have been vacated and remanded.

Moreover, unless the writ is granted in this case, this Court's remand in *Brown* will be futile. Should the Fourth Circuit overturn its ruling in *Brown* on the basis of *Falcon*, so long as *Hill II* remains good law, intervenors will argue that success on the merits in *Brown* cures any "technical" or "formal" errors in the certification process. This Court's ruling in *Brown* will lose all meaning in light of the ever present possibility of post-remand intervention established by *Hill II*.

approved an order by the district court that prevented named plaintiffs, all of whom were black women, from representing a class including black men, on the grounds that the interests of the two groups were in conflict. Although the proof presented at trial established that both black men and black women were victims of racial discrimination, the Fifth Circuit refused to expand the scope of the class to include black men and "save" the favorable findings, simply because the plaintiffs succeeded on the merits. Judge Goldberg's dissent, which is virtually identical to the majority ruling in *Hill II*, graphically illustrates the conflict between *Payne* and *Hill II*.[15]

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[15] Judge Goldberg argued, without success, that

> [t]he district court's rationale for continuing to exclude black males from the plaintiff class even after trial was that there existed a *potential* conflict of interest between black females and black males. In this case, to paraphrase an old adage, the proof of plaintiffs' ability to represent the interests of black males was in the representation thereof. Clearly, any potential conflicts at the relief stage of the litigation did not hinder plaintiffs' counsel from presenting sufficient evidence of discrimination against black men to support the district court's findings that black men as well as women were victims of defendant's discriminatory hiring policies. What more should be required to sustain a finding that the interests of black males had been adequately represented for the purposes of Rule 23?

673 F.2d at 837-38. Moreover, the disposition by the Fifth Circuit of the plaintiffs' motion for rehearing illustrates further the conflict between *Payne* and *Hill II*. In *Payne*, the plaintiffs moved the panel to modify its opinion to make clear that four black males could intervene "to remedy the defect in representation" found by the court and save the favorable findings. Plaintiff-Appellees' and Cross-Appellants' Petition for Panel Rehearing and Clarification, at 2-3 (May 27, 1982). The plaintiffs explicitly relied upon *Hill II* in support of their motion. On July 6, 1982, the panel in *Payne* denied the plaintiffs' motion for clarification and rehearing, and the entire court refused to hear the case *en banc*, rejecting conclusively the proposition that defects in fundamental requirements for class composition and representation can be "cured," and favorable findings "saved," through *ex post facto* intervention.

The Third and Ninth Circuits also have rejected the approach espoused by the Fourth Circuit's split decision in *Hill II*. In *Gurmankin v. Costanzo*, 626 F.2d 1132 (3d Cir. 1980), the Third Circuit expressly relied on *Rodriguez* and Rule 23 in rejecting a plaintiff's claim that successful proof of classwide discrimination warranted reversal of an earlier decision to deny certification. And, in *Black Faculty Association of Mesa Community College v. San Diego College District*, 664 F.2d 1153 (9th Cir. 1981), although the district court found that the defendants had engaged in classwide racial discrimination in hiring, the Ninth Circuit refused to authorize classwide relief because none of the plaintiffs had standing to sue on behalf of the applicant class. Relying upon *Rodriguez*, the court vacated the judgment and dismissed the case, thereby rejecting the principle that mere success on class claims cures underlying defects in class composition.

These cases, coupled with *Rodriguez* and *Falcon*, establish that in employment discrimination class actions all of the prerequisites of Rule 23 must be met, and that success on the merits of claims that were improperly entertained in the first instance is not a substitute for compliance with Rule 23. *Hill II* stands alone in its insistence that success on the merits obviates all defects in class composition or representation.

C. The Decision Below Furthers an Unresolved Division Within the Fourth Circuit That Should Be Addressed By This Court.

The decision below, like the Fourth Circuit's decision in *Brown*, is one of several examples of the continuing conflict within the Fourth Circuit over the proper conduct of employment discrimination class actions. This conflict, over a vital and recurrent issue, demands this Court's attention.[16]

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[16] Because the intra-circuit conflict relates to recurring and important issues of employment discrimination law, and because so

The theory underlying *Hill II* and *Brown* has surfaced in other panel opinions of the Fourth Circuit,[17] and without action by this Court will continue to appear depending on the composition of any one panel. The conflicting decisions in *Hill I* and *Hill II* are but one example of this conflict. In some cases—*Brown* and *Hill II*—fundamental disregard for the importance of Rule 23 represents the majority approach. In other cases—such as *Abron v. Black & Decker*—a different panel has rejected this reasoning. Because this conflict has not been reconciled through petitions for rehearing *en banc*,[18] it should be remedied once and for all by this Court. Otherwise, the state of the law in the Fourth Circuit will remain in the intolerable condition described by Judge Russell, dissenting in *Brown*: "Confusion in the law for both litigants and

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many cases have resulted in closely divided *en banc* determinations, *infra*, an appropriate basis exists for a grant of certiorari. *See generally* R. Stern & E. Gressman, *Supreme Court Practice* 275-77 (5th ed. 1978) (cases cited therein).

[17] *See Abron v. Black & Decker (U.S.) Inc.*, 645 F.2d 951 (4th Cir. 1981), *modified*, 27 Empl. Prac. Dec. (CCH) ¶ 32,368 (4th Cir. 1982); *Chisholm v. United States Postal Service*, 665 F.2d 482, 493 n.14 (4th Cir. 1981). The source of this conflict is the firmly held conviction by a number of judges in the Fourth Circuit, as expressed by Judge Murnaghan dissenting in *Abron v. Black & Decker (U.S.) Inc.*:

> Where . . . a class [has] been certified [and a] trial has been held and the meritorious nature of the class claims established, . . . it is especially grievous to the members of the class . . . to destroy its legal status *because of a supposed technical defect in the representative's standing.*

654 F.2d at 975 (emphasis added).

[18] In *Abron v. Black & Decker*, in which the majority followed *Rodriguez* and ruled that a named plaintiff lacked standing to maintain a class action on behalf of class members suffering different injuries, the Fourth Circuit was evenly divided on whether to grant rehearing *en banc*. Several months later, the circuit again split evenly on whether to grant rehearing *en banc* in *Brown*, a case expressly repudiating the decision in *Abron*. And in *Hill II*, a decision adopting the same improper approach as in *Brown*, the vote against rehearing *en banc* was 6-4. App. 39a.

district courts, [with] the rights of the parties [left] to depend on the panel as constituted . . . ." 663 F.2d at 1299.

D. The Practical Effect of the Opinion Below Is to Permit Spurious Class Actions and Unrestrained Litigation That Will Tax Judicial Resources in All Areas of Substantive Law in All Circuits.

By establishing "success on the merits" as a cure for defects in class composition and representation, the majority in *Hill II* has stood accepted practice in class actions on its head. The guiding principle in class litigation is that the scope of the claims that may be adjudicated depends upon the nature and scope of the issues that the named plaintiffs have authority to raise, and that this must be determined at the outset of litigation.[19] Under Rule 23, the identity of the parties determines the scope of the issues to be litigated, rather than the scope of the issues determining the identity of the parties. By turning accepted practice around, the Fourth Circuit has established a form of class representation that grants any litigant a trial run on any class action claim, and then permits class counsel, if successful on the merits of claims that should not have been litigated in the first instance, to obtain intervenors and thereby legitimate the proceedings. Such an interpretation is simply not "consistent with the general policies embodied in Rule 23," and should be reviewed by granting this writ. *See Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); S. Ct. R. 17.1(a).

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[19] Rule 23 explicitly requires the trial court to determine the scope and nature of class claims "as soon as practicable after the commencement of an action as a class action," precisely to insure that the issues that may be litigated are framed properly in advance of litigation, that judicial resources will be used effectively and efficiently, and that a binding class judgment will result. For the same reason, Rule 23 provides that the court may issue a conditional certification order and may reconsider its certification order, but only "before the decision on the merits."

1. *The Opinion Below Countenances Spurious Class Actions.*

The 1966 Amendments to the Federal Rules were specifically designed to end the abuses of spurious class actions and prevent one-way intervention after a determination on the merits against a defendant.[20] Under the reasoning of *Hill II*, however, applicants can intervene after trial and reap the benefits of the prior favorable findings, although they would never have been bound by an adverse ruling in the litigation because the named employee-plaintiffs were not proper class representatives.[21] In other words, under the Fourth Circuit rationale improper certification redounds only to the benefit of the intervenors: they can use it to avoid an adverse determination on the merits, or use it as a basis for reinstating favorable findings on a motion to intervene.[22]

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[20] Advisory Committee's Note to Rule 23, 39 F.R.D. 69, 105-06 (1966). *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 545-47 (1974) (under old rule class members could await final judgment on the merits to determine whether participation would be favorable; members of class could benefit unfairly from favorable judgment without subjecting themselves to binding effect of unfavorable one).

[21] *See generally Philadelphia Elec. Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 459 (E.D. Pa. 1968) (judgments in overly broad class actions subject to due process attack by class members).

[22] Under these circumstances, the observation of then Judge, now Justice, Stevens, in his dissent in *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1207 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), is particularly appropriate:

> At a minimum, [Rule 23] requires the class to be defined before the merits of the case have been decided. This requirement is, of course, of special importance in litigation involving claims for damages or back pay. A procedure which permits a claim to be treated as a class action if plaintiff wins, but merely as an individual claim if plaintiff loses, is strikingly unfair.

The result in *Hill II* is no less unfair insofar as it allows intervenors to claim the benefits of improperly made findings. *See also*

2. *The Opinion Below Will Result in Unrestrained Class Litigation.*

Apart from establishing a rule of class action law manifestly unfair to defendants, the holding in *Hill II* will tax the resources of the judiciary immeasurably. Because control of class actions need not be established at the initiation of litigation through proper certification procedures,[23] class actions will assume an independent life, and extend for so long as new parties are willing to intervene as class representatives and claim the benefits of jurisdictionally defective findings. Moreover, at the time of such intervention, district courts will be forced into precisely the posture rejected by this Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). In *Eisen*, this Court in construing Rule 23

Kremer v. Chemical Constr. Corp., 102 S. Ct. 1883 (1982) (finality should not depend on which party prevails); *and see Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 353-54 (1980) (Powell, J. dissenting).

The rule devised in *Hill II* far exceeds opportunities available to litigants initiating new litigation under the doctrine of offensive collateral estoppel. The panel in *Hill II* acknowledged abundant authority that vacated findings, such as those in *Hill I*, would "have no vitality as precedent or res judicata in other litigation." 672 F.2d at 387, App. 9a. According to the panel, however, this authority did not apply to reinstatement in the same action. *Id.* at 388, App. 9a-10a. This distinction is without logic or reason, *see id.* at 398, App. 31a (Widener, J. dissenting), and results in the reappearance of the spurious class action.

[23] In fact, as pointed out by Judge Russell in his dissent in *Brown*, the natural consequence of *Hill II* is that in all but the clearest cases, class certification proceedings will become perfunctory exercises and prudent district courts will certify, on a *pro forma* basis, as broad a class as possible. If a district judge is presented with a close question as to class composition or representation, the rationale of *Hill II* dictates that judicial economies lie in broad certification and trial of as many claims as possible, with post-judgment intervention allowed to cure the defects. As Judge Russell emphasized in his dissent in *Brown*, the result "would mean that Rule 23 would be without meaning or effect and would be just a jumble of words stated in hypocritical mandatory terms." 663 F.2d at 1297.

expressly disapproved of examining the merits of the litigation and structuring the class accordingly. The concerns of this Court in *Eisen* are more than warranted under the decision in *Hill II*, which approves structuring the class on the basis of an actual (although vacated) judgment—not simply a provisional ruling on the merits as in *Eisen*.[24]

The novel intervention theory set forth in *Hill II* rewards gamesmanship by class counsel. There was no reason why applicants could not have been secured as named plaintiffs at the initiation of this lawsuit seven years ago in 1975.[25] In 1979, after final adjudication of all issues the named plaintiffs could properly present, counsel for the plaintiffs first secured intervenors to pursue claims that had been ruled outside the scope of the litigation. This case now continues despite the final adjudication and dismissal of all claims the original named plaintiffs had authority to bring. The unreviewed applicant class claims in this case thus have developed a life of their own and continue to search for a proper

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[24] The opinion below also threatens the basic premise underlying the restriction by this Court on appeals of class certification decisions. This Court has consistently held that interlocutory appeals are unnecessary and that errors in class certification can be remedied properly after completion of the proceedings below. Under the panel opinion, however, appeal as of right after completion of the case is a useless exercise, and erroneous grants of class certification are in effect unreviewable. Even if the class certification ruling is reversed on appeal, as in *Hill I*, adverse classwide findings on the merits may be used as a basis for post-judgment intervention. Thus under *Hill II* interlocutory appeals, as soon as the plaintiffs prevail on a class certification motion, stand as the only practical method of review.

[25] All of the purported intervenors are represented by counsel for the named plaintiffs, and one of the purported intervenors is the sister of an original named plaintiff who has averred that she was aware of the litigation. The two other purported intervenors did not apply for work at Western Electric until 1979, more than three years after the trial on the merits.

plaintiff, despite the opinion in *Hill I* establishing that, as a matter of law, they should never have been part of the case.[26]

Finally, the decision below squarely conflicts with this Court's efforts to insure that employment discrimination litigation is conducted in accordance with the federal rules and the statutory framework established by Congress. In the trilogy of cases decided during the 1976 Supreme Court term,[27] as amplified by the decision in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *Falcon*, *supra*, this Court has established parameters to insure that Title VII cases, and particularly class actions, remain reasonable and manageable. This Court has done this by, *inter alia*, limiting eligibility to represent a class to those who are members of the class and suffer the same injury as class members (*Rodriguez* and *Falcon*), carefully structuring the allocation and burden of proof (*Burdine*), and refusing to countenance an overbroad theory of "continuing violations" that would have revived stale claims (*Evans*). The decision in *Hill II* is totally inconsistent with this Court's emphasis on careful and structured management of employment discrimina-

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[26] As emphasized by Judge Widener in his dissent in this case,

> [I]n the case now before this court, there was no classwide [hiring] liability legitimately adjudicated in the initial case because, as this court held in [*Hill I*], the class was overly broad and thus not properly constituted.
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> * * *
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> The named plaintiffs [in *Hill I*] were never part of the class of disappointed applicants for employment and thus certification never should have occurred.

672 F.2d at 393, 397, App. 20a, 28a. Class counsel recently informed the defendant of their intention to file yet another motion to intervene on behalf of a new putative intervenor.

[27] *See* n. 11 *supra*.

tion litigation, and thus should be addressed by this Court.[28]

II. THE DECISION BELOW PRESENTS NOVEL AND FUNDAMENTAL QUESTIONS CONCERNING THE JURISDICTION OF FEDERAL COURTS AND CONFLICTS WITH OTHER DECISIONS OF THIS COURT AND DECISIONS IN OTHER CIRCUITS.

A. The Decision Below Conflicts with the Holdings of This Court.

The decision below not only contravenes the central tenets of Rule 23, it raises an issue of substantial significance under Article III regarding class action litigation that warrants the attention of this Court.[29] The original named plaintiffs in this case were all employees, and never satisfied the fundamental requirement of membership in the applicant class. As the court in *Hill I* explicitly held, these employees did not suffer the

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[28] There is an additional ground for this Court to exercise its supervisory powers and grant this writ. The panel in *Hill II* completely disregarded the law of the case doctrine. This Court has recognized this doctrine as an essential and longstanding rule of practice within the federal judiciary, designed to insure finality and guard against panel shopping within appellate tribunals. *See, e.g., United States v. United States Smelting Ref. & Mining Co.*, 339 U.S. 186 (1950). In *Hill I*, the first panel vacated the hiring findings and failed to provide for post-remand intervention, thus clearly establishing, as the law of this case, that the classwide hiring findings were without any legal basis or significance. *See EEOC v. International Longshoremen's Ass'n*, 623 F.2d 1054, 1058 (5th Cir. 1980), *cert. denied*, 451 U.S. 917 (1981). By ignoring the law of the case, the panel in *Hill II* has encouraged panel shopping, discouraged the voluntary settlement of class litigation, and clearly departed from the usual and accepted course of judicial proceedings.

[29] S. Ct. R. 17.1(a), *see United States Parole Commission v. Geraghty*, 445 U.S. 388, 390 (1980); *cf. Miner v. Gillette Co.*, 87 Ill. 2d 7, 428 N.E.2d 478 (1981), *cert. granted*, 102 S. Ct. 1767 (1982) (refusal by state court to apply traditional jurisdictional principles to multistate class suit).

same injury or possess the same interests as applicants. Yet, in *Hill II*, the lower court dismissed this prerequisite to class representation as "less fundamental than a pure jurisdictional requirement." 672 F.2d at 388, App. 10a.

In *Blum v. Yaretsky*, 102 S. Ct. 2777 (1982), this Court stated that "[i]t is axiomatic that the judicial power conferred by Art. III may not be exercised" unless class representatives establish they are members of the class they purport to represent. *Id.* at 2783.[30] Because the named plaintiffs in *Blum* failed to meet this fundamental requirement, this Court held that the district court had "exceeded its authority in adjudicating" class claims, and that favorable findings entered on behalf of the class were "wholly gratuitous and advisory." *Id.* at 2784-85. The assertion by the panel in *Hill II* that class membership is "less fundamental than a pure jurisdictional requirement" and that void class findings may be far more than "gratuitous and advisory" directly conflicts with the clear holding of this Court in *Blum*.[31]

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[30] *Blum* was decided approximately four months after the decision in *Hill II*, and the Fourth Circuit's failure to benefit from the holding in *Blum* is yet another reason to grant this petition.

[31] The need for class membership and common injury finds its origins in the justiciability requirements of Article III of the Constitution. To insure a case or controversy suitable for adjudication the class representative must establish his own personal interest, which must be shared by the members of the class. As stated by Chief Justice Burger,

> [A] named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.

Allee v. Medrano, 416 U.S. 802, 828-29 (1974) (opinion of Burger, C.J.). *See also Valley Forge Christian College v. Americans United For Separation of Church & State, Inc.*, 102 S. Ct. 752 (1982); *City of Los Angeles v. Lyons*, 453 U.S. 1308 (1981) (Rehnquist, J.,

Moreover, the holding in *Hill II* that defects in class composition and representation may be cured and that vacated hiring findings can somehow be resuscitated directly conflicts with the holding of this Court that findings of fact made without jurisdiction are void *ab initio*. In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), this Court explicitly held that a court without jurisdiction to hear a case "was without authority to decide the merits." 449 U.S. at 379. This Court indicated that orders entered without jurisdiction lack any force or effect and cannot be cured, for "by definition, a jurisdictional ruling may never be made prospective only." *Id.* Subsequent decisions by this Court have emphasized the central holding of *Firestone*, and highlight further the error of the court below.[32]

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in chambers) (application for stay granted), *cert. granted*, 102 S. Ct. 1426 (1982); *H.L. v. Matheson*, 450 U.S. 398 (1981); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 40 n.20 (1976); *Warth v. Seldin*, 422 U.S. 490, 502 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974).

This Article III requirement is incorporated in, and congruent with, the initial requirement of Fed. R. Civ. P. 23(a) that "one or more members of a class may sue. . . ." *See, e.g., O'Shea v. Littleton*, 414 U.S. 488, 494 & n.3 (1974); *Bailey v. Patterson*, 369 U.S. 31, 32-33 (1962); *Feldman v. Simkins Indus., Inc.*, 679 F.2d 1299 (9th Cir. 1982); *Machella v. Cardenas*, 653 F.2d 923 (5th Cir. 1981); *see generally*, 7 C. Wright & A. Miller, *Federal Practice and Procedure* § 1761 (1972).

[32] *See, e.g., Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n*, 102 S. Ct. 1357, 1365 n.10 (1982) (Marshall, J.) ("[i]t is axiomatic that a judgment must be supported by a proper showing of jurisdiction over the subject matter and over the relevant parties"); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099 (1982) (White, J.) ("[t]he validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties").

By ignoring established authority, and by sanctioning jurisdiction without class membership, the holding below embraces the

B. The Decision Below Conflicts with Decisions Throughout the Circuits.

The decision below directly conflicts with the holdings of the Third, Fifth, Sixth, Seventh, and Tenth Circuits, the D.C. Circuit, and the Court of Claims. All these appellate tribunals have held that judgments entered without jurisdiction are void.[38] Moreover, the Third Circuit

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extreme rejected by this Court in *United States Parole Commission v. Geraghty*: premising jurisdiction on " 'the bare existence of a sharply presented issue in a concrete and vigorously argued case' . . . ." 445 U.S. at 406 n.10 (quoting Justice Powell's dissent, *id.* at 421) (1980). The holding of this Court in *Geraghty* never addressed the issues raised in this case. *Geraghty* dealt with mootness and efforts to appeal an erroneous denial of class certification, by a named plaintiff who was clearly a member of the putative class at the time certification was improperly denied. Similarly, neither do the Fourth Circuit's "headless class" cases, *e.g., Simmons v. Brown*, 611 F.2d 65 (4th Cir. 1979), support the plaintiffs' position. These cases again involve an erroneous *denial* of class certification entered at a time when the named plaintiff was apparently a proper representative. In *Hill II*, however, "[t]he named plaintiffs were never part of the class of disappointed applicants and . . . certification never should have occurred." 672 F.2d at 397, App. 28a (Widener, J. dissenting).

[38] *See, e.g., Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 918-19 (3d Cir. 1981); *Amalgamated Sugar Co. v. Bergland*, 664 F.2d 818, 821-24 (10th Cir. 1981); *Hydaburg Cooperative Ass'n v. United States*, 667 F.2d 64, 66 (Ct. Cl. 1981); *Alabama Hospital Ass'n v. United States*, 656 F.2d 607 (Ct. Cl. 1981), *cert. denied*, 102 S. Ct. 2006 (1982); *Bank of Montreal v. Olafsson*, 648 F.2d 1078, 1079-80 (6th Cir.), *cert. denied*, 102 S. Ct. 641 (1981); *Simpson v. Motorists Mut. Ins. Co.*, 494 F.2d 850, 854 (7th Cir.), *cert. denied*, 419 U.S. 901 (1974); *Nader v. Volpe*, 466 F.2d 261, 265 (D.C. Cir. 1972); *Troy State University v. Dickey*, 402 F.2d 515, 516 (5th Cir. 1968).

The majority in *Hill II* attempted to distinguish many of these cases on the ground that they apply to efforts to use jurisdictionally void judgments in subsequent litigation, not the same action. As Judge Widener stated in his dissent, "[T]he difference is really immaterial," and that "[l]ogically it makes little difference whether the attempted subsequent litigation is a continuation of the same action or is a separate action." 672 F.2d at 398, App. 32a. Indeed,

in *De Nafo v. Finch*, 436 F.2d 737 (3d Cir. 1971), and the Tenth Circuit in *City & County of Denver v. Matsch*, 635 F.2d 804 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 3114 (1981), have directly held, contrary to *Hill II*, that litigants cannot reinstate or cure jurisdictionally void findings in the same litigation.[34]

III. THIS CASE PRESENTS CRITICAL QUESTIONS REGARDING THE RESPONSIBILITY AND AUTHORITY OF TRIAL COURTS TO SUPERVISE CLASS ACTION LITIGATION AND CONFLICTS WITH PRINCIPLES REPEATEDLY SET FORTH BY THIS COURT AND EVERY CIRCUIT.

Under the holdings of this Court, and every circuit that has confronted the issue, district courts are afforded broad discretion in disposing of motions for permissive

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the entire premise of the attempted intervention in this case is to avoid the normal principles of *res judicata* and collateral estoppel, which would preclude reinstatement of a void judgment in new litigation.

[34] The sole case law relied upon by the panel in *Hill II* for the proposition that jurisdictional defects can be cured, *Finn v. American Fire & Casualty Co.*, 207 F.2d 113 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954), is not applicable to the Article III and Rule 23 issues in this case, and as Judge Widener emphasized has been effectively overruled by this Court in *Firestone Tire & Rubber Co. v. Risjord*, *supra*. *See Hill II*, 672 F.2d at 397-98, App. 29a-32a (Widener, J. dissenting).

Nor does *Mullaney v. Anderson*, 324 U.S. 415 (1952), the principal case relied upon by plaintiffs, apply to the issues in this case. *Mullaney* applied a real-party-in-interest analysis and permitted a last minute amendment of a defective pleading before this Court by union agents clearly authorized by union members to litigate on their behalf. In *Hill II*, however, the plaintiffs never had the capacity to litigate on behalf of applicants, and, as held by the Tenth Circuit in *City & County of Denver v. Matsch*, *supra*, efforts to "cure" jurisdictionally defective findings under such circumstances are impermissible.

intervention.[35] Moreover, the majority of circuit courts to consider the issue have adopted the corollary rule that a movant for post-judgment permissive intervention must offer a substantially stronger showing than usual to prevail.[36]

In this case, the district court, in light of its five years of experience overseeing an exceptionally complex piece of litigation, denied the post-remand motion to intervene on the grounds that it was untimely and would prejudice the existing class members and unnecessarily complicate and delay completion of the case. Rather than enter a "routine per curiam dismissal of the appeal," 672 F.2d 392, App. 18a (Widener, J. dissenting), the Court of Appeals explicitly refused to follow prevailing legal standards.

First, in finding that the district court afforded timeliness and prejudice to the original parties more weight than "general experience" would warrant, the Fourth Circuit rejected the fundamental premise that Rule 24(b)

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[35] *See NAACP v. New York*, 413 U.S. 345, 366 (1973); *Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 970 (3d Cir. 1982); *Wade v. Goldschmidt*, 673 F.2d 182 (7th Cir. 1982); *Stotts v. Memphis Fire Dep't*, 679 F.2d 579 (6th Cir. 1982); *United States v. Louisiana*, 33 Fed. R. Serv. 2d 1119 (5th Cir. 1982); *Washington Ass'n for Retarded Citizens v. Thomas*, 33 Fed. R. Serv. 2d 177 (9th Cir. 1981); *Michigan Association for Retarded Citizens v. Smith*, 657 F.2d 102 (6th Cir. 1981); *Culbreath v. Dukakis*, 630 F.2d 15 (1st Cir. 1980); *see generally* 7A C. Wright & A. Miller, *Federal Practice and Procedure* §§ 1913, 1923 (1972).

[36] *See, e.g., Delaware Valley Citizens' Council for Clean Air v. Pennsylvania*, 674 F.2d 970 (3d Cir. 1982); *Stotts v. Memphis Fire Dep't*, 679 F.2d 579 (6th Cir. 1982); *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657 (9th Cir.), *cert. denied*, 439 U.S. 837 (1978); *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977); *United States v. Allegheny-Ludlum Indus., Inc.*, 553 F.2d 451 (5th Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); *McClain v. Wagner Elec. Corp.*, 550 F.2d 1115 (8th Cir. 1977); *EEOC v. United Air Lines, Inc.*, 515 F.2d 946 (7th Cir. 1975).

is a device entrusted to the discretion of the trial court because the trial court is in the best position to gauge the impact of permissive intervention on the orderly processing of the case. This usurpation of the role of the district court, and disregard for findings of a factual nature made by the district court regarding the effects of intervention, are contrary to recognized limits on the authority of appellate tribunals. This is particularly true where, as here, the appellate court can point to no improper findings in support of its ruling, but rather only to a theoretical disagreement over the impact of intervention upon the course of litigation. This Court has consistently addressed through grants of certiorari such deviations from proper standards of appellate review. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 102 S. Ct. 2182 (1982); *Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982); *Piper Aircraft Co. v. Reyno*, 102 S. Ct. 252 (1981).

Second, the Fourth Circuit deviated from the three express statutory criteria for permissive intervention—timeliness, common questions of law or fact, and prejudice to rights of the original parties—and added a novel factor, reinstatement of previously vacated findings. Consideration of this factor is totally unwarranted under the language of Rule 24(b), and antithetical to the efficient conduct of class actions by district courts under Rule 23. More than seven years after this complaint was filed, the parties are now required to litigate in an intervention proceeding issues that were supposedly resolved long ago in class action proceedings under Rule 23.[37] The burden such novel and unending class litigation places on the federal court system is simply unauthorized under Rule 24(b), and unnecessary, and should not be countenanced by this Court.

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[37] A preliminary sample of such issues includes, *inter alia*, whether the intervenors are formally qualified to represent any class, and whether the intervenors can represent the class previously certified in error.

CONCLUSION

For the reasons set forth in this petition, Petitioner requests that this Court grant its Petition for a Writ of Certiorari and set this case for argument or, in the alternative, vacate and remand this case for further consideration in light of *Falcon*, as was done last term in *Brown v. Eckerd Drugs, Inc.*

Respectfully submitted,

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September 7, 1982

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-1279

OLLIE T. HILL, JOHN W. WARD, CHARLES R. MERRIWEATHER, JR., EDWARD H. MINATEE, MINNIE MARBLE, MARY E. CARTER, Individually and on behalf of all other persons similarly situated,

Appellants,

v.

WESTERN ELECTRIC COMPANY, INC.,

Appellee.

EQUAL EMPLOYMENT ADVISORY COUNCIL,

Amicus Curiae.

Argued Feb. 3, 1981

Decided March 1, 1982

Before WIDENER and PHILLIPS, Circuit Judges, and RICHARD L. WILLIAMS, United States District Judge, sitting by designation.

JAMES DICKSON PHILLIPS, Circuit Judge:

In this appeal, three unsuccessful applicants for employment with Western Electric Company (Western) challenge the denial of their motion to intervene in a class action against Western as representatives of a portion of the class consisting of blacks and females who have discriminatorily been denied employment at Western's Arlington, Virginia facility. We vacate the order denying intervention on the basis that the district court did not adequately assess the motion, and remand for reconsideration of the motion in light of our discussion in this opinion.

I

This is the second appeal arising from a class action originally filed by eight present and former employees

of Western seeking injunctive relief and back and front pay for alleged violations by Western of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981 in discriminating against blacks and females in hiring, job placement and promotion at its Arlington, Virginia facility.

A central issue on the first appeal and again on this one involves the inclusion within the plaintiff class of unsuccessful hiring applicants as well as employees denied promotions and job assignments. In its original structuring of the class, the district court first concluded that it could not include such persons because none of the then named representative plaintiffs had been denied employment but were all employees. On the basis of our decision in *Barnett v. W. T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975), however, the district court reversed its earlier certification decision and expanded the class to include those who suffered discrimination in hiring. The expanded class was defined to include those blacks and females "who have applied for employment at Defendant's facility in Arlington, Virginia, since July 2, 1965, or who will hereafter apply."

Following a three-day bench trial the court issued a memorandum opinion concluding that Western had discriminated against blacks and women in violation of Title VII in hiring, job placement and promotion at its Arlington, Virginia facility, *Hill v. Western Electric Co.*, No. 75-375-A (E.D. Va., April 30, 1976) (mem.) and subsequently entered a decree providing for a special master's determination of claims to back and front pay by identified members of the certified class. Western was required to institute priority hiring and promotion of blacks and females to remedy past discrimination and to develop and implement nondiscriminatory, job-related hiring and promotion criteria to avoid future discrimination. To prevent Western from seeking to avoid compliance with the decree through institutional reorganization,

the court appended a footnote to the decree in which it stated that "[t]he Arlington facility for purposes of this decree encompasses . . . any functional successor" to either of the operations based at that facility. Jt. App. at 276.

On appeal, we affirmed in part, reversed in part and remanded. *Hill v. Western Electric Co.*, 596 F.2d 99 (4th Cir. 1979). With respect to the inclusion of hiring discriminatees in the certified class, we stated that, while our decision in *Barnett* arguably might have authorized the named plaintiffs, who were employed, to represent persons denied employment, that possibility was now foreclosed by the Supreme Court's intervening holding in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977), that a class representative must "possess the same interest and suffer the same injury" as the class members he or she seeks to represent. Therefore, we vacated the district court's finding of discrimination in hiring for lack of an adequate representative for those members of the certified class who allegedly were discriminatorily denied employment. *Hill v. Western Electric Co.*, 596 F.2d at 101-02. Following the denial of plaintiffs' petition for certiorari, our mandate was reinstated, and the case was remanded to the district court.

Plaintiffs' counsel then filed motions for intervention or to amend the complaint to add three new plaintiffs—Bailey, Johnson and Furr—to the action. Intervention was sought on behalf of the individuals and on behalf of the class of rejected applicants for employment at Western's Arlington facility. With respect to the qualifications of the three proposed intervenors, plaintiffs alleged that Bailey was a black female who had been denied employment at the Arlington facility in 1972 and 1973 as the result of discriminatory hiring practices, which have continued, without interruption, to the present. She filed a

charge with the EEOC on November 6, 1979 and was issued a right-to-sue letter on December 6, 1979.

Johnson, a black female, and Furr, a black male, alleged that they had unsuccessfully applied for employment with Western as "installers" in August 1979. Although they applied at Western's Landover, Maryland facility, they contended that this facility was a successor to one of the operations that had been housed at Western's Arlington facility. They also alleged that they had been denied employment because they failed to pass a test that was essentially the same as the one that the district court had found to be discriminatory when used at the Arlington facility. Johnson filed a charge with the EEOC on October 2, 1979, while Furr filed his charge on October 17, 1979. Both were issued right-to-sue letters on December 6, 1979.

Ruling on the motion to intervene, the district court first concluded that it was not precluded by the terms of the remand of this court from allowing intervention but, in the exercise of its discretion, then denied the motion. The court gave two essential reasons. First, the length of time that the case had continued from its filing in May 1975. On this the court observed that "[i]t's time this case got concluded." Second, said the court, intervention would require a hearing on the hiring claims, and this would delay relief on the job assignment claims now upheld on the first appeal because "it's impractical if not impossible to be running part of the case here and part before the master on the job assignments claims."

Plaintiffs and Western subsequently reached, and submitted to the district court, a settlement agreement covering all outstanding issues in the litigation except for the claims relating to hiring discrimination. The court entered a final judgment approving this agreement on September 19, 1980, and this appeal challenging the refusal to allow intervention for prosecution of the hiring claims followed.

II

The sole issue is the propriety of the district court's denial of the motion for permissive intervention under Fed.R.Civ.P. 24(b).[1] Although a decision on a Rule 24(b) motion lies within the sound discretion of the trial court, *Black v. Central Motor Lines, Inc.*, 500 F.2d 407, 408 (4th Cir. 1974), some standards have been developed to guide the courts in making intervention determinations. We conclude that the district judge did not properly apply those standards here.

The court first emphasized the lateness of the motion in the progress of the protracted litigation. We have held, however, that in ruling on motions for intervention "[m]ere passage of time is but one factor to be considered in light of all the circumstances." *Spring Construction Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980); *accord, Atkins v. State Board of Education*, 418 F.2d 874 (4th Cir. 1969). In a class action the critical issue with respect to timeliness is whether the proposed intervenor moved to intervene "as soon as it became clear . . . that the interests of the unnamed class members would no

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[1] Western also argued below and now presses on this appeal the contention that the district court was "expressly precluded" from permitting intervention in in the present case by our refusal to grant a petition for rehearing following the original appeal. In a footnote to their petition for rehearing, plaintiffs referred to *Goodman v. Schlesinger*, 584 F.2d 1325 (4th Cir. 1978), and *Cox v. Babcock & Wilcox Co.*, 471 F.2d 13 (4th Cir. 1972), in which, upon finding that the named plaintiffs were not adequate representatives of a class, we remanded the cases with instructions that the class actions be retained on the docket for a reasonable time to afford an opportunity for a proper class representative to step forward. Plaintiffs remarked in the petition that failure to use such a procedure in the present case was "unfathomable." Western now reasons that, because plaintiffs requested in their petition for rehearing that we instruct the district court to utilize the procedure mandated in *Goodman* and *Cox*, our denial of that petition constitutes an express prohibition of intervention on remand. We ascribe no such significance to the denial of the petition.

longer be protected by the named class representatives." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 394, 97 S.Ct. 2464, 2469, 53 L.Ed.2d 423 (1977). Because the airline stewardess in *McDonald* had moved to intervene within the time for taking an appeal and as soon as she was advised that the named class representatives did not intend to prosecute an appeal, the Supreme Court in that case affirmed the court of appeals' reversal of the district court's order denying intervention. *Id.* at 396, 97 S.Ct. at 2470.

Invoking this standard, Western argues that the proposed intervenors should have become aware of the need and moved to intervene at the very latest when the court of appeals entered its inadequacy of representation decision in April 1979. A motion to intervene filed more than nine months after that date could not have been timely says Western.

The proposed intervenors, on the other hand, argue that they were under no obligation to seek intervention until the Supreme Court denied plaintiff's petition for a writ of certiorari on October 29, 1979. On this we agree with the intervenors. Until the Supreme Court denied certiorari the named class representatives were actively pursuing, and had not been foreclosed from representing, the interests of the hiring class. At the time certiorari was denied, proposed intervenors Johnson and Furr had already begun the administrative action that was a procedural prerequisite to their intervention by filing charges with the EEOC, and proposed intervenor Bailey took that step eight days later on November 6, 1979. All three proposed intervenors received their right-to-sue letters on December 6, 1979. Just as the stewardess in *McDonald* timely sought intervention within the thirty days available for taking an appeal, the proposed intervenors in the present case, by filing their motion on January 17, 1980, timely sought intervention well within the 90 days that they had under section 706(f)(1) of Title VII to institute suit.

In any event, the "most important consideration [in passing on an application for intervention] is whether the delay has prejudiced the other parties." *Spring Construction Co. v. Harris*, 614 F.2d at 377. Western clearly could claim no prejudice from the delay itself because, like the employer in *McDonald*, it was "put on notice by the filing of the . . . complaint of the possibility of classwide liability, and there is no reason why . . . pursuit of that claim should not be considered timely under the circumstances." *United Airlines, Inc. v. McDonald*, 432 U.S. at 395, 97 S.Ct. at 2470.

The prejudice that might have resulted to those members of plaintiff class whose claims had been affirmed on appeal presents a much more troublesome question. In fact, this may have been the district court's primary reason for denying intervention. Courts have properly "emphasized the seriousness of the prejudice which results when relief from long-standing inequities is delayed." *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir. 1978). Moreover, it is clear that had intervention been allowed the district court would have been compelled to conduct a hearing on class certification, *see Simmons v. Brown*, 611 F.2d 65, 67 (4th Cir. 1979), and that some relitigation on the merits would have followed.

Any prejudice to other members of the class could have been avoided, however, by simply bifurcating the proceedings. While the trial court considered it "impractical if not impossible to be running part of the case here and part before the master on the job assignments claims," it gave no reasons in support of this conclusion and Western has offered none on appeal. The claims of those members of the class alleging discrimination in hiring essentially were ones to be heard on the merits of liability, while those for discrimination in job assignments needed only to be heard on damages. Bifurcation of Title VII class action proceedings for hearings on liability and damage is now commonplace, and there is all the more justification for such a procedure when, as here, separable claims, sub-

ject if necessary to structuring by sub-classes, Fed.R.Civ. P.23(c)(4)(B), are involved. While we owe great deference to the special capability of a trial judge to gauge better than can we such practical difficulties, we conclude that here the impracticality envisioned was given greater weight than general experience warrants.

In a general attack on the propriety of intervention, Western contends that post-remand intervention is an unusual procedure and should be granted only in exceptional circumstances. To the extent any more stringent standard for intervention following judgment is warranted, however, it must be based upon heightened prejudice to the parties and more substantial interference with the orderly process of the court in that context, *MacDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1072 (5th Cir. 1970), and "[i]f neither of these results would occur the mere fact that judgment already has been entered should not by itself require an application for intervention to be denied." C. Wright & A. Miller, 7A *Federal Practice & Procedure*, § 1916, at 582 (1972). We have on a number of occasions permitted intervention following remand, *see, e.g., Spring Construction Co. v. Harris*, 614 F.2d at 376, and see no special prejudice factors operating here to preclude application of the usual standards.

In addition to our perception that the factors directly drawn upon by the district court in denying intervention were given undue weight, we think the court failed to consider—or gave insufficient weight to—another factor possibly militating in favor of intervention. That is the possibility that the original findings of discrimination in hiring might be reinstated were intervention allowed and the intervenors found in the process to be adequate representatives of a properly certified class.[2] Given the likeli-

[2] Although the district court made no express reference to this factor in its oral denial of the motion for intervention, it was apparently presented to the court, *see* Jt. App. at 412, and we therefore consider it appropriate to take that factor into account on appeal.

hood that if denied intervention, these unsuccessful intervenors or others would pursue the class claim in a new action, *see Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 461 (E.D.Pa.1968), reinstatement of the findings and conclusions already made on the claim in this action would have the virtues of conserving judicial resources and of avoiding the risk of inconsistent sequential adjudications of the critical issues.

Whether reinstatement under these circumstances might ever be appropriate and, if so, the conditions under which it might be are apparently questions we have not previously addressed. Western contends—apparently as an absolute principle of judical power—that reinstatement is simply not possible. Vacation of the judgment in favor of the hiring claimants on appeal had the effect, contends Western, of rendering the findings upon which it was based void *ab initio*. The cases cited to support this, however, stand only for the proposition that vacated findings have no vitality as precedent or res judicata in other litigation. *See, e.g., Simpson v. Motorists Mutual Insurance Co.*, 494 F.2d 850 (7th Cir. 1974); *Troy State University v. Dickey*, 402 F.2d 515 (5th Cir. 1968). *But cf. Dunlop v. Rhode Island*, 398 F.Supp. 1269 (D.R.I.1975) (while vacated holding of earlier case may not be given collateral estoppel effect in subsequent case, findings of fact in earlier case may be adopted in subsequent case if no new evidence presented).

More apposite when the question is, as here, the propriety of their reinstatement in the same action is *Finn v. American Fire & Casuaity Co.*, 207 F.2d 113 (5th Cir. 1953). *Finn* was a removed diversity case in which a jury returned a verdict against one of two insurance companies sued by a policyholder. On appeal the Supreme Court vacated the district court judgment because of a lack of perfect diversity. Upon remand perfect diversity was obtained by dismissal of one of the defendants, but the district court declined to reinstate plaintiffs' vacated judg-

ment on the basis that it had been renderd without jurisdiction. Not so, said the Fifth Circuit on appeal, jurisdiction was not wholly lacking at the time and the judgment might, in the district court's discretion, be reinstated now that the jurisdictional defect had been cured. *Finn v. American Fire & Casualty Co.*, 207 F.2d at 115; *accord, Levering & Garrigues Co. v. Morrin*, 61 F.2d 115 (2d Cir. 1932).

Finn's general principle—with which we agree—is that upon remand following the vacation of a judgment for a jurisdictional defect, it may be appropriate for a trial court to reinstate the judgment once the defect has been cured. This principle must certainly extend past the reinstatement of a judgment itself to reinstatement of findings and conclusions supporting it, and past true jurisdictional defects to less fundamental defects not affecting the merits. The critical limiting factor is of course that the error or defect must not have infected the merits of the very determination sought to be reinstated.

The defect of inadequate representation in a class action concededly has, in general, both merits and non-merits implications. Viewed only as a special form of standing requirement in class actions, it smacks of jurisdiction. As such, it is clearly even less fundamental than a pure jurisdictional requirement, so that reinstatement of findings following cure of this defect would seem even more justifiable than reinstatement following cure of a true jurisdictional defect.

On the other hand, this defect can be viewed as one potentially affecting the merits. Obviously, the requirement of adequate representation of the class members' interests looks to insuring a fair result on the merits, in a way that true jurisdictional requirements do not. To this extent, reinstatement following a cure of this defect might be seen as less justifiable.

From this it is obvious that the defect is not susceptible to general categorization in these terms. Rather, inquiry

must turn in the particular case upon whether the specific inadequacy found did or did not probably affect the merits in a way making reinstatement inappropriate. Three inquiries are pertinent to this determination: whether the new class representative desires or resists reinstatement; whether the finding of inadequacy was based solely upon a formal lack of identity of interests and injury between representative and class or upon demonstrated ineffectiveness of representation, and whether the party opposing the class will be unfairly prejudiced by the reinstatement. Resistance to reinstatement by the new class representative, inadequacy based upon demonstrated ineffectiveness of representation, and prejudice to the party opposing the class all suggest an effect upon the merits and militate against reinstatement, while the converse of each suggests a jurisdiction-like defect militating in favor of reinstatement once it is cured.

The new class representative's attitude is relevant because it is primarily to protect the interests of the class that the adequacy requirement exists, *see generally* C. Wright & A. Miller, 7 *Federal Practice and Procedure: Civil* § 1765 (1972).[3] If properly qualified new representatives are satisfied with generally favorable findings made under technically "inadequate" representation, it can

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[3] That the adequacy of representation requirement of Fed.R.Civ.P. 23(a)(4) may be thought to operate in close conjunction with the commonality of issues requirement of 23(a)(2) and the typicality of claims requirement of 23(a)(3) to shape the class action issues in ways protective of the party opposing the class as well as the class members, *see Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267, 273 (4th Cir. 1980), does not belie the fact that its primary purpose is to insure, in the words of the rule, that "the representative parties will fairly and adequately protect the interests of the class." It should of course be open to a party opposing the class to resist reinstatement on the basis that, under the particular circumstances, that party's interests were directly jeopardized in this way by the fact that class members' claims were litigated in their behalf by persons who did not share their interests and injuries.

reasonably be assumed that the class members' primary interests in fairness, *see* Fed.R.Civ.P. 23(a)(4), have been served and that the "inadequacy" was only formal.

The determination of inadequacy on appeal may have been concerned only with a technical lack of identity of interest and injury between representative and class, *e.g.*, *Hill v. Western Electric Co.*, 596 F.2d at 101-02, or only with the actual ineffectiveness of a technically qualified representative, *e.g.*, *Nance v. Union Carbide Corp.*, 540 F.2d 718 (4th Cir. 1976), *vacated and remanded on other grounds*, 431 U.S. 952, 97 S.Ct. 2671, 53 L.Ed.2d 268 (1977), or with both, *e.g.*, *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. at 405, 97 S.Ct. at 1898. To the extent inadequacy is based solely upon lack of sufficient identity of interest, any presumed adverse effect on the merits stemming from this may in fact be utterly belied by the outcome, as we recognized, for example, in *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1380 (4th Cir. 1972) (representation adequate even though representative's individual claim without merit).[4] To the extent the inadequacy determination was based solely upon a presumption of ineffectiveness from lack of shared interest rather than a demonstrated ineffectiveness, it resembles the jurisdictional defect whose cure was held in *Finn* to permit reinstatement, and should be treated accordingly.

Even if the above two factors favor, or do not necessarily preclude, reinstatement of findings favorable to

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[4] *Rodriguez*, holding that failure of a named plaintiff's claim prior to class certification precluded subsequent class certification with that plaintiff as representative, expressly noted that "a different case would be presented if the [trial court] had certified a class and only later had it appeared that the named plaintiffs were . . . inappropriate class representatives." *Rodriguez*, 431 U.S. at 406 n.12, 97 S.Ct. at 1898 n.12. This "different case" is of course exactly the one presented in *Brown* and in the instant case. "In such a case," said the *Rodriguez* Court, ". . . the claims of the class members would not need to be mooted or destroyed . . . ." *Id.*

the class, prejudice to the party opposing the class must nevertheless be separately assessed. This should be done in terms of practical fairness, and should proceed on the realization that reinstated findings will of course be subject to review for error in their original adoption if they are thereafter incorporated in any appealable order or judgment.

We think that the district court could not properly assess the propriety of allowing intervention here without carefully evaluating the appropriateness of reinstating its findings of fact and conclusions of law on the hiring claims if intervention were allowed. Orderly consideration of that possibility should, we believe, follow a threshold consideration of the formal qualifications of the proposed intervenors. Both below and on this appeal Western attacked the formal qualifications of each on a variety of procedural and jurisdictional grounds.[5] These were not addressed by the district court in view of its decision not to permit intervention on other grounds.

These objections should be addressed in the first instance by the trial court, as a preliminary to its reconsideration of the propriety of allowing intervention by any of the proposed intervenors found qualified as representatives.[6] If a proposed intervenor is found not for-

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[5] These were: that the court lacked jurisdiction in respect of one of the intervenor's claims because it was not timely filed; that the court lacked venue in respect of the claims of other intervenors because based upon discrimination occurring at a Maryland facility; and that none of the intervenors' claims was cognizable because of premature issuance of right-to-sue letters by the EEOC.

[6] With respect to the last of these—premature issuance of right-to-sue letters—we offer these observations. Whatever the "jurisdictional" consequence of premature issuance of right-to-sue letters or of premature commencement of private enforcement actions under Title VII, *see EEOC v. Cleveland Mills*, 502 F.2d 153, 155-56 (4th Cir. 1975) (dictum: "private right of action may not be exercised until the lapse of 180 days"), we think they do not apply to subsequent motions, such as these, to intervene as class representatives in an ongoing class action as to which this possibly

mally qualified to act as a class representative the intervention inquiry as to that person obviously need proceed no further.

"jurisdictional" predicate has already been met. To the extent the 180-day lapse before letter or suit is a jurisdictional predicate, *see EEOC v. Raymond Metal Products Co.*, 385 F.Supp. 907, 916 (D.Md. 1974), *aff'd in relevant part*, 530 F.2d 590 (4th Cir. 1976), it is so only to "avoid[] potential interference with the Commission in the performance of its primary duties of conciliation and enforcement." *EEOC v. Cleveland Mills*, 502 F.2d at 156 (dictum). Where, as here, the original right to sue letter and commencement of action were not so premature, any "jurisdictional" concern on this score has been satisfied both as to the class and as to any putative members of that class who may thereafter seek intervention as named plaintiffs. *Cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 & n.8, 95 S.Ct. 2362, 2370, 45 L.Ed.2d 280 (1974). Accordingly, we hold that premature issuance of right-to-sue letters to the putative intervenors here would not, standing alone, preclude their intervention to prosecute individual or, as representatives, class claims.

A related problem, however, not specifically addressed by the parties, but potentially dispositive of the right of anyone effectively to intervene to press individual or class claims of hiring discrimination, is suggested by this challenge of prematurity, and must be addressed by the court on remand. That problem is whether, prior to commencement of the class action, *Western* was given fair notice and an opportunity to resolve through administrative conciliation the hiring discrimination claims now sought to be asserted by the intervenors. This was *Western's* due, *see Scott v. Board of Education*, 18 F.E.P. Cas. 1230, 1233 (D.Md. 1979), and if it has not been accorded, those claims, either class or individual, may not now be prosecuted in this action by these intervenors or others. *Cf. EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14 (2d Cir. 1981) (EEOC suit dismissed for lack of fair opportunity in advance of action to "discuss [challenged] practices" at two of national chain's stores).

On this question the record on this appeal is completely silent, and it must therefore be addressed in the first instance by the district court upon remand. This inquiry should be conducted in light of the generally accepted principle that the scope of a Title VII lawsuit may extend to "any kind of discrimination like or related to allegations contained in the charge and growing out of such allegations during the pendency of the case before the Commission." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 466 (5th Cir. 1970); *see also EEOC v. General Electric Co.*, 532 F.2d 359, 373

If the district court finds any of the proposed intervenors formally qualified to represent the class,[7] it should then reconsider the motion for intervention in light of our discussion of the appropriate standards and factors applicable in this case. In that connection, we make these specific observations.

First, for reasons earlier stated, we think that neither the post-remand timing of the motion, nor any supposed prejudice to the interests of other members of the plaintiff class from intervention should militate against its allowance on the particular facts here presented.

Second, in considering the propriety of reinstating its hiring claim findings and conclusions as that bears upon the intervention question, we believe the court should be guided by the following considerations. The first inquiry should be whether any proposed intervenor[s] found preliminarily qualified to serve as class representative desire in behalf of the class to have the findings reinstated. If they do, this independent judgment can be taken as an indication that the class, for its part, considers that the representation provided the class members' interests in litigation of their hiring claims was "fair and adequate" per Rule 23(a)(4).

Next, the court should take into account that this court's determination of inadequacy of representation on the first appeal was based entirely upon the formal lack of sufficient identity of interests between any class repre-

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(4th Cir. 1976). This means that if *Western* was in fact given fair notice and an opportunity to discuss charges of, or administrative inquires about, discrimination in hiring at its Arlington, Virginia facility prior to commencement of the class action intervention is not, on that basis alone, precluded.

[7] Of course, even though an intervenor may be found preliminarily qualified over Western's procedural and jurisdictional challenges, *see* note 5 *supra*, he or she may yet be revealed to be an inadequate representative by subsequent developments, *see* note 4 *supra*. But that must of course abide those developments.

sentatives and the non-hired members of the class. *See Hill v. Western Electric Co.*, 596 F.2d at 101-02. We did not then address the question of the actual effectiveness of the representation notwithstanding its formal inadequacy. When actual effectiveness is explored as a matter of first instance inquiry, it is obvious that the representation actually provided had all the indicia of diligence and practical effectiveness,[8] including most notably that it yielded a favorable result on these class members' claims.

Lastly, in assessing any prejudice to the party opposing the class from reinstatement of the hiring-claim findings, three considerations are important. The first is that those findings were made in a normal adversary context in which no prejudice could have been suffered by Western from the fact alone that the class members were then "inadequately" represented for class action purposes. The second, earlier mentioned, is that the findings, if reinstated, would of course be subject to appellate review for error leading to their original adoption if they then found

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[8] The class representatives asserted and sought class certification of the claim of discrimination in hiring from the outset of their lawsuit. Jt. App. at 15. Plaintiffs presented evidence in support of this claim, including the testimony of a number of experts. *See id.* at 77-219. Based on the evidence submitted by plaintiffs, the district court concluded that Western had discriminated in hiring against both blacks and females at its Arlington, Virginia facility. *Id.* at 236. To remedy past discrimination and to prevent its recurrence in the future, the district court ordered the award of back pay to those who had been discriminatorily denied employment, priority hiring of those same persons as vacancies became available, and the formulation and implementation of nondiscriminatory, job-related employment criteria. *Id.* at 314.

In addition, plaintiffs vigorously defended the district court's decision on Western's appeal to this court. When we vacated that decision with respect to the hiring claims, plaintiffs sought reconsideration of our decision in a petition for rehearing directed to this court and in a petition for a writ of certiorari addressed to the Supreme Court. One can therefore hardly imagine more diligent representation.

their way into any appealable order or judgment adverse to Western. The third is that to the extent Western has relevant evidence of events occurring or conditions arising after the date of the findings—as opposed to new evidence of events and conditions predating the findings [9]—reinstatement would not of course preclude consideration of that evidence, assuming it is otherwise admissible.

The action is remanded for further proceedings consistent with this opinion.

VACATED AND REMANDED.

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[9] A ready example of the critical distinction, for this purpose, between new evidence to refute existing findings and evidence of new post-finding events or conditions, may be suggested by Western's contention, advanced in the district court in opposing the motion to intervene, that it now has new evidence validating its pre-employment test. From this Western apparently contended that reinstatement of the findings would result in no economy of resources and avoid no duplications of proof because it would be entitled as a matter of course to introduce this (and presumably any other relevant) evidence to relitigate the underlying issue if intervention were allowed.

If this is the contention, it is flawed. To the extent the validity of that test, hence Western's business necessity defense based upon it, has already been determined adversely to Western on the evidence then before the court, there would obviously be no legal right on Western's part, were the court disposed generally to reinstate the findings, to have either that or any other finding reopened to permit the introduction of new evidence bearing upon it. The situation, instead, would be perfectly analogous to that in which a party seeks as a matter of the court's discretion to have findings set aside on the basis of additional evidence under Fed.R.Civ.P. 52(b) or 59(a)(2), or to be relieved from the effect of a judgment because of newly discovered evidence under Fed.R.Civ.P. 60(b)(2).

In direct contrast, if evidence were available to Western that since the date of the findings a new pre-employment test had been adopted, that evidence might be admissible as a matter of right because relevant in establishing the terminal date of any continuing violation originally found by the court, hence the composition of the class entitled to ultimate relief.

WIDENER, Circuit Judge, dissenting:

Notwithstanding the majority's extended opinion in this case, the only issue before this court on appeal is whether the trial court erred in refusing to allow the appellants to intervene in the underlying action, pursuant to Rule 24(b) of the Federal Rules of Civil Procedure. The standard for judging such permissive intervention motions is whether the trial court abused its discretion, and "unless that discretion is abused, the court's ruling will not be disturbed on review." *NAACP v. New York*, 413 U.S. 345, 366, 93 S.Ct. 2591, 2603, 37 L.Ed.2d 648 (1973); 7A Wright & Miller, *Federal Practice and Procedure* § 1913 at 551-552 (1972). I do not believe we can make a finding of abuse of discretion, and therefore I respectfully dissent. We have converted what I think should have been a routine per curiam dismissal of the appeal into a strained reversal.

I

The principal consideration for a trial court in deciding permissive intervention motions is whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. *United States Postal Service v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978); Wright & Miller, *supra*. The trial court considered such criteria in denying intervention, and thus we should be wary of overruling its decision. It noted the lengthy period already taken for disposition of this action and the prospect for future lengthy delays. It further noted that lengthy hearings were likely as to whether these particular intervenors were qualified class representatives. Such hearings would either delay those proceedings already on remand or would require bifurcation of the action, a procedure the trial judge found to be "impractical if not impossible." While the majority has taken issue with the trial judge's characterization of the problems with bifurcation, it relies only on its statement

that bifurcation is common in Title VII actions, and offers no explanation of why the trial judge was wrong about bifurcation in the case at hand.[1] In a determination which was essentially factual, I am reluctant to disagree with, and certainly would not reverse, an experienced trial judge who is intimately familiar with five years of extended litigation simply because it is theoretically possible to effect bifurcation through the use of subclasses. If the trial court believes and finds that intervention will cause undue delay, then absent a showing that such intervention will not cause delay, which does not appear here, I do not think that we may properly find that the trial court has abused its discretion.

Not only may a trial court deny intervention on the basis of undue delay, but it may also consider whether intervention will prejudice any of the parties. The majority has found that Western would not be prejudiced by an intervention because it was "put on notice by the filing of the . . . complaint of the possibility of classwide liability, and there is no reason why . . . pursuit of that claim should not be considered timely under the circumstances." At 386, quoting *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395, 97 S.Ct. 2464, 2470, 53 L.Ed. 2d 423 (1977). I must disagree. First, if intervention is allowed, Western is prejudiced because the original ad-

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[1] While the majority makes no mention of the particular problems with bifurcation in this case, it admits that on remand there are numerous questions to be considered involving the qualifications of these individuals to serve as class representatives. At 390 & n. 6. It also should be noted that while the majority finds it significant that the trial judge did not explain the particular problems to be incurred on bifurcation, at ——, the trial judge's statement appears as part of a ruling from the bench and not as part of a formal memorandum. I also note my disagreement with the entire premise of footnote 6 of the majority opinion. It is apparent from the record that the EEOC did not receive any complaints on Western's hiring practices until October 2, 1979, over four years after this action was filed in district court, and nearly three years after the order initially appealed from.

verse findings of the trial court may well, and probably will, be reinstated under the majority opinion. As discussed in the third part of this dissent, these findings would be reinstated under the majority opinion even though previously vacated by this court. *Hill v. Western Electric Corp.*, 596 F.2d 99 (4th Cir.), cert. denied 444 U.S. 929, 100 S.Ct. 271, 62 L.Ed.2d 186 (1979). Certainly only a direction for final judgment could be more prejudicial to the defendant.

Second, the reasoning from the *McDonald* case, relied upon by the majority, is inapplicable in the present action. In *McDonald*, the original litigation involved plaintiffs who were victims of the same discriminatory practices alleged in the subsequent class action appeal. 432 U.S. at 387, 97 S.Ct. at 2466. The only difference between the plaintiffs in each action was that those initially bringing the suit had filed formal protests against the practice. *Id.* In both actions, the underlying substantive question was the same and the issue was independent of the composition of the putative class. By contrast, in the case now before this court, there was no classwide liability legitimately adjudicated in the initial case because, as this court held in its first opinion, the class was overly broad and thus not properly constituted. At issue in the original trial of this case were Western's personnel policies concerning a wide range of employees and would-be employees. When this court held that job applicants were not properly part of this class, it held in terms there was error in the original conduct of this case: ". . . the named plaintiffs may not properly maintain an action for redress of alleged discrimination in hiring." 596 F.2d at 102. A primary reason for requiring commonality among class members is to prevent class action defendants from being prejudiced through defense of unmanageable actions. Certainly a finding that the original class was overly broad and our vacation of the judgment of the district court is a necessary indication that the original action prejudiced Western.

In light of this prejudice and the trial court's well reasoned conclusion that intervention would cause undue delay for the original parties, I do not believe that the trial court abused its discretion in denying intervention.

II

Other wholly independent grounds call for affirming the district court's exercise of discretion in its denial of intervention. *SEC v. Chenery Corp.*, 318 U.S. 80, 88, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943). The record on appeal indicates that the intervenors are not members of the class of job applicants which was involved in the first trial and thus it is incorrect to allow their intervention now. Even if their status may not be perfectly clear, their claims to class membership are doubtful at best, and certainly are "too speculative and too contingent on unknown factors to conclude that there was an abuse of discretion in denying leave to intervene." *Sutphen Estates v. United States*, 342 U.S. 19, 23, 72 S.Ct. 14, 17, 96 L.Ed. 19 (1951). Allowing them to intervene would have unjustifiably complicated the proceedings by adding extraneous issues. *Montgomery v. Rumsfield*, 572 F.2d 250, 255 (9th Cir. 1978); *Lipsett v. United States*, 359 F.2d 956, 959-60 (2d Cir. 1966); 3B Moore's *Federal Practice* ¶ 24.10[4]; Wright & Miller, *supra*, § 1913 at 556-57. It is apparent from the discussion which follows that the issues as to class membership would have been much more appropriately handled at a separate trial. *Lipsett*, 359 F.2d at 960.

Two of the three intervenors, Darlene Johnson and Victor L. Furr, III, did not apply for employment with Western until 1979 and then made application to Western's Landover, Maryland facility. The trial in this case took place in 1976, three years *before* Johnson and Furr applied, and the trial concerned Western's hiring practices in Arlington, Virginia. It is apparent that the conditions at Landover experienced by Furr and Johnson

were radically different from those at Arlington considered at trial. First, even if the Landover facility is considered a functional successor to the Arlington facility,[2] all hiring decisions at Landover are made by Western's Maryland Installation District personnel and not the Virginia Installation District personnel responsible for Arlington. The practices of the Virginia personnel who interviewed job applicants for the Arlington facility were considered by the district court to be a factor in the evidence of discrimination against women and blacks. Second, even if the Landover applicants could be considered to have constructively applied to the Arlington facility, that facility made a major change in its hiring practices in 1976, the year of the trial. Beginning then, most entry level hiring was done through referrals from the Virginia Employment Commission rather than through a variety of sources. Western's earlier practices connected with the advertising of available positions had been a major concern of the trial court. Finally, and perhaps most importantly, even though it concerns only part of the district court's decision, Western's hiring of women and blacks in the 1976-79 period at its Arlington Service Center was significantly higher than in previous years. During that period, 53% of new hires were female and 70% were members of minority groups. These percentages are close to or even above the quotas set in the district court's decree,[3] and are not too different from the percentage of total applicants which came from each group (applicants were 50% female and 72%

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[2] Western does not deny that its Maryland Installation District has assumed some installation duties that were formerly handled by the Arlington facility. It is important to note, however, that the Arlington facility housed both service and installation facilities and that all of the service and most of the installation functions remain at Arlington.

[3] The district court decree stated that if qualified individuals were available, the Arlington Service Center's new hires must be 60% female and 67% black.

minority). Statistics from earlier years which showed Western hired a far higher percentage of white, male applicants than female and black applicants had been a significant contributor to the district court's finding that Western discriminated. It is thus obvious that even though the district court's decree never took effect, Western's hiring practices in 1979 were far different than those prior to the 1976 trial. Furr and Johnson did not "suffer the same injury as the class members." *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 403, 97 S.Ct. 1891, 1896, 52 L.Ed.2d 453 (1977).

The third intervenor, Betty Bailey, claims to have filed applications with Western in 1972 and 1973, but did not file a complaint with the EEOC until November 1979. There is a 180 day statute of limitations for the filing of Title VII complaints with the EEOC, 42 U.S.C. § 2000e-5(e), although courts will toll the deadline for members of a class where there is a class action underway. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 (3d Cir.), cert. denied, 421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679 (1975); see *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 553, 94 S.Ct. 756, 766, 38 L.Ed.2d 713 (1974). Courts will not toll the statute, however, where the individual could not have participated in the original action. That is, if the statute of limitations had already expired for the individual when the action was first commenced, then the individual cannot be considered a member of the class before the court. *McDonald*, 432 U.S. at 392, 97 S.Ct. at 2468; *Wetzel*, 508 F.2d at 246.[4] Bailey claims she applied to Western at the latest in 1973, was interviewed and not hired. The complaint in this action was filed in district

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[4] Courts have recognized an exception to this rule in the case of continuing violations of Title VII statutes. See *Williams v. Norfolk & Western Railway*, 530 F.2d 539 (4th Cir. 1975). As explained in footnote 5, Bailey cannot be considered to be the victim of continuing discrimination.

court on May 14, 1975. Right to sue letters were issued for the original class representatives in February and April 1975. Bailey's brief does not even claim that her complaint was within 180 days of the time Ollie Hill, et al, filed their EEOC complaints; thus it is apparent that Bailey's 180 day statute of limitations expired before this action commenced.[5] She simply was not "a member of that class against whom the statute had not run at the time the class action was commenced." *McDonald*, 432 U.S. at 392, 97 S.Ct. at 2468.

Because none of the three intervenors were members of the class whose case was before the trial court, it

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[5] In its memorandum opinion following trial, the district court rejected the argument that scrutiny of Western's hiring practices should be limited to those applying for jobs in the 180 day period prior to the filing of charges with the EEOC. Instead, the court certified a class including those who applied for jobs since July 2, 1965, the effective date of Title VII. It relied on our opinion in *Williams v. Norfolk & Western Railway*, 530 F.2d 539 (4th Cir. 1975), as the basis for concluding that Western's hiring policies were a continuing violation of Title VII. I believe the district court misconstrued the *Williams* opinion, which concerned an employer's continuing refusal to award seniority rights to veteran black employees. *Id.* at 541-42. By contrast, Western's decision not to hire Bailey in 1973 can only be considered to be a discrete event. There would not have been a continuing policy not to hire her, in contrast to the plaintiffs in *Williams* who challenged "this continuous discrimination, rather than any single discriminatory act." 530 F.2d at 542. See *In re Consolidated Pretrial Proceedings*, 582 F.2d 1142, 1148-49 (7th Cir. 1978). To allow Bailey to participate in this action, even though it was instituted after the expiration of her 180 day statute of limitations, would render the limitation meaningless. See *Bronze Shields, Inc. v. New Jersey Department of Civil Service*, 667 F.2d 1074 at 1080-1086 (3d Cir. 1981); *In re Consolidated Pretrial Proceedings*, 582 F.2d at 1148-49; *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1234 (8th Cir. 1975).

The reason that the application for employment and its non-acceptance must be considered the discrete act to commence the statute running is that unless something started the process, a person who wanted a job but never applied could sue under Title VII by simply filing an EEOC complaint, *see Bronze Shields* at p. 1083.

would have been proper for the district court to deny intervention on this ground alone. There is thus no basis for this court to reverse the denial of intervention.

III

While the question of whether the trial judge abused his discretion in denying intervention is the only one before the court, the majority's extensive discussion of the effect intervention will have on reinstatement of the original findings of the trial court makes necessary my indicating disagreement with those conclusions also. Such holding renders meaningless this court's first opinion and contradicts the teachings of the Supreme Court in *East Texas Motor Freight v. Rodriguez*, 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977). In *Hill I*, this court ordered the finding of discriminatory hiring practices vacated because:

> [t]he interest of these named, employed plaintiffs in being free of discrimination in job assignments and in promotions is so different in kind from that of people who were denied any employment that the named plaintiffs may not properly maintain an action for redress of alleged discrimination in hiring. Under *Rodriguez*, certification of a class including victims of alleged hiring discrimination who never were employed by Western Electric was in error.

596 F.2d at 102. This court concluded:

> Our conclusion is that on this record a finding of discrimination against blacks and females is warranted only in job assignments to Shop Trades and against females in job assignments in the warehouse in the Service Center. Upon remand, the court should frame an appropriate decree consistent with this opinion, granting appropriate relief with respect to those job assignments. *In all other respects, the findings of the district court are vacated.*

Id. at 107 (emphasis added).

It is difficult for me to understand how this court can now say that simply by changing the identification of the class representatives, the problems noted in *Hill I* are cured. It is the clear teaching of *Rodriguez* that courts will not permit improperly constituted classes even in Title VII actions. The Supreme Court has said:

> [C]areful attention to the requirements of Fed.Rule Civ.Proc. 23 remains nonetheless indispensible. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may be the real victims of discrimination.

431 U.S. at 405-06, 97 S.Ct. at 1897-98. The majority in the present action has sought to distinguish *Rodriguez* by saying:

> *Rodriguez*, holding that failure of a named plaintiff's claim prior to class certification precluded subsequent class certification with that plaintiff as representative, expressly noted that "a different case would be presented if the [trial court] had certified a class and only later had it appeared that the named plaintiffs were . . . inappropriate class representatives." *Rodriguez*, 431 U.S. at 406 n. 12 [97 S.Ct. at 1898 n. 12]. This "different case" is of course exactly the one presented in [*Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.), cert. denied 409 U.S. 982 [93 S.Ct. 319, 34 L.Ed.2d 246] (1972)], and in the instant case. "In such a case," said the *Rodriguez* Court, ". . . the claims of the class members would not need to be mooted or destroyed. . . ." *Id.*

At 389, n. 4.

The majority, however, in its quotations from *Rodriguez*, has omitted a vital clause from the Supreme Court's opinion which actually said:

> [A] different case would be presented if the District Court had certified a class and only later had it appeared that the named plaintiffs were not class members or were otherwise inappropriate class representatives. In such a case, the class claims would have already been tried, and, *provided the initial certification was proper* and decertification not appropriate, the claims of the class members would not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims. See, e.g., *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 752-757 [96 S.Ct. 1251, 1258-60, 47 L.Ed.2d 444]; *Moss v. Lane Co.*, 471 F.2d 853, 855-856 (CA4).

431 U.S. at 406, n. 12, 97 S.Ct. at 1898, n. 12 (emphasis added). Clearly, the case at issue is one where the initial certification was *not* proper. In *Hill I*, we so held and said, "Under *Rodriguez*, certification of a class including victims of alleged hiring discrimination who never were employed by Western Electric was in error." 596 F.2d at 102. The majority's distinction of *Rodriguez* here thus contradicts both our first *Hill* opinion and *Rodriguez* itself.

It is important to distinguish the facts here from cases such as *Brown v. Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir.), cert. denied, 409 U.S. 982, 93 S.Ct. 319, 34 L.Ed.2d 246 (1972), and *Moss v. Lane Co.*, 471 F.2d 853 (4th Cir. 1973).[6] Those cases involved so-called "headless classes" where a plaintiff brought suit as a class representative, was certified by the court, and then turned out to be an inappropriate class representative because his individual claims failed. In *Brown*, for example, the trial court determined that the class representative had not suffered discrimination after the court had certified the

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[6] See also *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *Simmons v. Brown*, 611 F.2d 65 (4th Cir. 1979); *Goodman v. Schlesinger*, 584 F.2d 1325 (4th Cir. 1978); *Cox v. Babcock & Wilcox Co.*, 471 F.2d 13 (4th Cir. 1972).

class. 457 F.2d at 1379. Nevertheless, this court allowed the action to continue after being satisfied that evidence of discriminatory hiring practices existed. *Id.* at 1383. Similarly in *Moss*, this court reversed the dismissal of a class action where the class representative's individual claim was found baseless. 471 F.2d at 855-56.

By contrast, in the instant case the class representative's claim was found to be tenable, but under *Rodriguez* he was not permitted to represent employees who were not similarly injured. The error was in the certification process. 596 F.2d at 102. Unlike the headless class situation, the error here was manifest and patent from the beginning of the action, and not an error discoverable only upon commencement of trial. The named plaintiffs were never part of the class of disappointed applicants for employment and thus certification never should have occurred.

The majority characterizes the problems with the original certification as involving only a "technical lack of identity of interest and injury between representative and class," at 389, and thus easily cured. It reiterates that the first *Hill* decision "was based entirely upon the formal lack of identity of interests." *Id.* at 391. Such statements trivialize both *Hill I* and *Rodriguez* by their necessary implication that class composition is of little or no importance in Title VII actions. Admittedly, this court has not been consistent in its attitude toward the breadth of classes in employment discrimination litigation. In many cases, both before and after *Rodriguez*, we have refused to tolerate overly broad classes. E.g., *Abron v. Black & Decker*, 654 F.2d 951 (4th Cir. 1981); *United Black Firefighters of Norfolk v. Hirst*, 604 F.2d 844 (4th Cir. 1979); *Belcher v. Bassett Furniture Industries, Inc.*, 588 F.2d 904 (4th Cir. 1978); *Doctor v. Seaboard Coast Line R. Co.*, 540 F.2d 699 (4th Cir. 1976). In others, however, we have allowed broadly constituted actions to proceed. E.g., *Brown v. Eckerd Drugs*, 663 F.2d 1268 (4th

Cir. 1981); *Barnett v. W. T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975). In light of the language of *Rodriguez* that class representatives must "'possess the same interest and suffer the same injury' as the class members," 431 U.S. at 403, 97 S.Ct. at 1896, it is clear that the course taken in the cases mentioned first just above is that approved by the Supreme Court. Nevertheless, the majority holds that an overly broad class is only a "technical" problem and that proceeding with such a class has no real effect on the case. I can not accept this proposition. If it is adopted, *Rodriguez* is robbed of its virtue, and while it may remain good law, there will be no reason for a district court to enforce its holding in this circuit.

Crucial to the majority's holding is the conclusion that an appellate court's order vacating a decision because of faults in class certification does not preclude a court from subsequently reinstating the substantive findings. The majority quite candidly admits that this is a question not previously addressed, at 387-388, and for precedent relies upon *Finn v. American Fire & Casualty Co.*, 207 F.2d 113 (5th Cir. 1953). In *Finn*, the defendants had removed an action to district court even though there was imperfect diversity among the parties. The Supreme Court ordered that the trial court vacate its judgment because imperfect diversity had meant that the district court was without jurisdiction to hear the matter. *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 18-19, 71 S.Ct. 534, 542, 95 L.Ed. 702 (1951). On remand, the district court dismissed a not indispensable defendant and then ordered a new trial because the court concluded that prior to the dismissal, it had been wholly without jurisdiction to hear the matter. 207 F.2d at 114.[7] The Fifth Circuit reversed the granting of a new trial and ordered reinstatement of the prior judgment against the remaining defendant. It relied on cases holding that dismissal of a

[7] The Supreme Court, in remanding *Finn*, specifically did not reach the question of whether it would be proper to reinstate the verdict if perfect diversity was created through dismissal of a party. 341 U.S. at 18, n. 18, 71 S.Ct. at 542, n. 18.

not indispensable party, even after trial, can be given the retroactive effect of saving the trial court's initial findings. E.g., *Dollar S.S. Lines v. Merz*, 68 F.2d 594, 595 (9th Cir. 1934).

While the *Finn* decision was probably permissible at that time,[8] a quite recent Supreme Court decision necessarily overrules its holding. In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981), the Court considered whether it is proper for a court of appeals to apply only prospectively a ruling that if applied to the case before the court of appeals would deprive that court of jurisdiction. *Id.* at 369-70. In *Firestone*, the Eighth Circuit had held prospective only application was proper and thus reached the merits of the case. The Supreme Court reversed and stated, "If the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over. *A court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . .*" *Id.* at 379 (emphasis added).[9] Application of this principle to *Finn* shows that the district court there properly ordered a new trial after dismissing one of the defendants. That court had been without jurisdiction when the dismissed defendant was a party before it and thus it was as legally impossible for the trial court to reach the merits of the case as it was for the Eighth Circuit to reach the merits of the case in *Firestone*.[10]

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[8] See *Horn v. Lockhart* and footnote 10, both *infra*.

[9] This aspect of the *Firestone* case was discussed at the 1981 Fourth Circuit Judicial Conference by Professors Mishkin, Wright, Phemister and Rutherglen (Conference Materials at 17), who take the position that *Firestone* overrules our decision on prospective application in *Lester v. McFaddon*, 415 F.2d 1101, 1106-08 (4th Cir. 1969). See also *Richardson v. McFadden*, 563 F.2d 1130, 1132-33 (Hall, J., concurring) (discussing the impropriety of ruling on the merits when a federal court lacks jurisdiction).

[10] The reasoning in *Firestone* is particularly applicable to the facts in *Horn v. Lockhart*, 84 U.S. (17 Wall.) 570, 21 L.Ed. 657

Without *Finn* and its allied cases, the majority here has no case support for the proposition that courts have discretion to reinstate judgments vacated because of defects in the underlying action. I believe that the correct disposition of this question should be to follow those courts and authorities which have concluded that vacated judgments are not *res judicata* and thus have no precedential value in subsequent litigation. E.g., *Simpson v. Motorists Mutual Insurance Co.*, 494 F.2d 850, 854 (7th Cir. 1974); *Nader v. Volpe*, 466 F.2d 261, 265 (D.C.Cir. 1972); *DeNafo v. Finch*, 436 F.2d 737, 740 (3d Cir. 1971); *Troy State University v. Dickey*, 402 F.2d 515, 516 (5th Cir. 1968); *Dunlop v. Rhode Island*, 398 F. Supp. 1269, 1273 (D.R.I. 1975); 1B Moore's *Federal Practice* ¶ 0.416[2] at 2231. The majority here has distinguished several of the above cases because they concerned use of vacated findings in subsequent actions rather than in continuation of the same action. At 387-388. Not only is that not true of *DeNafo*, for example,[11]

(1873), a case relied on in many of the decisions cited by the Fifth Circuit in *Finn*. In *Horn*, the defendant twice before the final decree challenged the jurisdiction of the trial court, alleging a lack of complete diversity. The trial court nevertheless proceeded with the action and reserved its opinion on the question of jurisdiction. After determining that certain parties could be dismissed so as to create diversity, the court entered a final decree against the remaining parties, and the Supreme Court affirmed. *Id.* at 579. The *Firestone* Court's statement that a "court lacks discretion to consider the merits of a case over which it is without jurisdiction," 449 U.S. at 379, 101 S.Ct. at 676, indicates that a court should no longer proceed in the manner the trial court did in *Horn*.

[11] In *DeNafo*, the plaintiff sought judicial review of an administrative decision denying him Social Security disability benefits. The district court reversed the denial but then vacated its findings to allow the Secretary of Health, Education & Welfare to reconsider the earlier findings. 436 F.2d at 739. When the administrative process again resulted in a denial of benefits, the claimant argued that the district court's first decision to award benefits was the "law of the case" and binding on HEW under principles of *res judicata*. The Third Circuit disagreed, "since the court below vacated its original judgment." *Id.* at 740.

but the difference is really immaterial. The essence of the principle of *res judicata* is that questions once litigated between two parties cannot be litigated again. Logically it makes little difference whether the attempted subsequent litigation is a continuation of the same action or is a separate action. In this case, the question of whether Western was guilty of discriminatory hiring practices was never properly before the trial court because there was never a proper plaintiff. That the court's finding should be accorded *res judicata* effect under these circumstances is fundamentally incorrect.

I also feel it necessary to comment on the majority's statement that "conservation of judicial resources" favors the reinstatement of the previous findings. "Conservation of judicial resources" and its cousin "judicial economy" are currently popular phrases which to my observation are often used to shortcut regular procedures, as here. We have before us an attenuated proceeding that has involved countless hours and thousands of dollars of the litigants' resources, attorneys' resources, and judicial resources. We have now had this case before us twice, and under today's ruling we shall doubtless see it again. It is a little late to be worried about conservation of judicial resources. Our obligation is to provide a fair, impartial and thorough analysis of matters that come before us. Bypassing fundamental judicial principles such as *res judicata* so that we can be efficient does not serve that purpose. In an analogous situation, where the majority holding restricted the availability of a jury trial, the dissenting justice observed:

> No doubt parallel 'procedural reforms' could be instituted in the area of criminal jurisprudence, which would accomplish much the same sort of expedition of court calendars and conservation of judicial resources as would the extension of collateral estoppel in civil litigation. Government motions for summary judgment, or for a directed verdict in favor of the

> prosecution at the close of the evidence, would presumably save countless hours of judges' and jurors' time. It can be scarcely doubted, though, that such 'procedural reforms' would not survive judicial scrutiny under the jury trial guarantee of the Sixth Amendment. Just as the principle of separation of powers was not incorporated by the Framers into the Constitution in order to promote efficiency or dispatch in the business of government, the right to a jury trial was not guaranteed in order to facilitate prompt and accurate decision of lawsuits.

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 348, 99 S.Ct. 645, 660, 58 L.Ed.2d 552 (1979) (Justice Rehnquist, dissenting). When part of the trial court's decision in this case was vacated by *Hill I*, the trial became a nullity as to those issues, and that vacated decision was not meant to be resurrected. If anyone connected with this case was qualified to judge the most judicially efficient way to dispose of it, it was the trial judge. He concluded that allowing intervention would cause undue delay, and I agree.

IV

The progress of this case raises additional questions which the majority has failed to confront, but nevertheless merit comment. No opinion, I suggest, should be written without taking them into account when the disappointed intervenor has other adequate means of enforcing his right.

First, I have serious doubts whether a person denied permissive intervention under FRCP Rule 24(b) can appeal that decision separately from other issues which remain to be heard. While courts recognize the finality of decisions regarding denials of intervention of right sought under FRCP Rule 24(a),[12] the considerations are

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[12] *Sutphen Estates, Inc. v. United States*, 342 U.S. 19, 20, 72 S.Ct. 14, 15, 96 L.Ed. 29 (1951).

far different on motions made solely for permissive intervention. The majority here implicitly assumes that permissive intervention motions are so separately appealable and the major treatises apparently would agree where there has been a "clear abuse of discretion." 9 Moore's, *supra*, ¶ 110.13[7] at 182; 7A Wright & Miller, *supra*, § 1923 at 627, 630. Nevertheless, I believe the reasoning of Judge Friendly to be much more appropriate in such situations:

> Where the sole ground urged for reversal of an order denying permissive intervention is abuse of the trial judge's discretion, we would be reluctant to permit the fragmentation and delay that would result from allowing such orders to be appealed, at least so long as the applicant has "other adequate means of asserting his rights." [citations omitted].

Levin v. Ruby Trading Corp., 333 F.2d 592, 594 (2d Cir. 1964). Moore's, at 182, also recognizes this view. Such reasoning is consistent with the Supreme Court's reasoning in *Sutphen Estates v. United States*, 342 U.S. 19, 72 S.Ct. 14, 96 L.Ed. 19 (1951). There the trial court's denial of permissive intervention was affirmed because there were too many speculative and unknown factors concerning whether the applicants were entitled to intervene. Allowing appeals of such denied permissive intervention motions has the same effect recognized in *Sutphen Estates* of delaying the proceedings below.

Similarly, in *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U.S. 137, 142, 64 S.Ct. 905, 907, 88 L.Ed. 1188 (1944), a case which involved an appeal following the entry of a final decree, the Supreme Court noted that review of certain antitrust decisions was vested solely in the Supreme Court "to prevent the delay of unwarranted appeals by disappointed applicants to intervene, which would suspend the ultimate disposition of suits under the antitrust acts. . . ."

The delays caused by appeals of such denied permissive intervention motions would be readily illustrated by the instant case, but for further error. On February 8, 1980, the trial court denied intervention, and on March 5, 1980, the attorneys filed a notice of appeal on behalf of "*the plaintiffs and the proposed intervenors.*" Subsequently, on May 23, 1980, the original parties reached a settlement agreement covering all claims other than Western's hiring practices (which are involved here). On September 19, 1980, the district court entered an order approving this agreement and on December 30, 1981, following implementation of the agreement, the district court, by another order, dismissed all relevant parts of the suit with prejudice except those involved here.

I believe that it was manifestly incorrect for the parties to continue with the proceedings below, while an order of the district court affecting the parties was on appeal before this court. The appeal effectively denied the court below of any jurisdiction in this matter. *Armstrong v. Board of School Directors*, 616 F.2d 305, 327 (7th Cir. 1980); *Lewis v. Tobacco Workers International Union*, 577 F.2d 1135, 1139 (4th Cir. 1978).[15] The par-

[15] The instant case is similar in key aspects to *Zimmer v. McKeithen*, 467 F.2d 1381 (5th Cir. 1973), where, after the notice of appeal from a reapportionment order was filed, the district court attempted to change the order to encompass an alternative reapportionment plan. A panel of the Fifth Circuit refused to consider the revised plan, calling it a nullity. *Id.* at 1382. The Fifth Circuit, en banc, reversed the panel on the merits of the first plan, 485 F.2d 1297 (5th Cir. 1973), and the Supreme Court affirmed the en banc court, *sub nom., East Carroll Parrish School Board v. Marshall*, 424 U.S. 636, 638, n. 4, 96 S.Ct. 1083, 1084, n. 4, 47 L.Ed. 296 (1976). Significantly, the en banc court, as affirmed by the Supreme Court, reversed the district court, yet refused to consider the revised plan even though this could have obviated the need for subsequent judicial review. In all events, had the second plan had any effect, the question before both the en banc court and the Supreme Court would have been different. It thus appears that the Supreme Court has at least by implication acknowledged that a district court loses jurisdiction to effect settlement after notice of appeal has been filed.

ties and the district court proceeded with the settlement under the impression that it would be possible to consider the order on the intervention motion as an appealable order separate from the rest of the case. The fallacy in that reasoning is readily apparent. One of the trial court's principal grounds for denying the intervention motion was its stated reason that allowing intervention would interfere with carrying out that part of its decision which this court had affirmed. When the parties settled that part of the case, the factual setting before the district court no longer existed and the facts upon which this court now bases its decision no longer exist. So we are writing at least in part in a vacuum, giving our opinion upon a set of facts which we are aware do not exist. That alone is sufficient reason to dismiss this appeal. See *Mills v. Green*, 159 U.S. 651, 16 S.Ct. 132, 40 L.Ed. 293 (1895). The entire litigation was inextricably linked, and it is impossible for us to decide a part of the case while at the same time the district court is deciding another part of the case upon which our part depends, without the risk of procedural chaos. *In re Combined Metals Reduction Company*, 577 F.2d 179, 200-201 (9th Cir. 1977). There is bound to be at least serious doubt as to the validity of the orders of the district court approving the settlement and dismissing the action except the parts of the case now under review. This doubt is needless and would not have arisen had we followed the simple rule of dismissing appeals in which the sole question for review is the abuse of discretion of the district court in denying intervention under FRCP 24(b) and in which the intervenors have, as here, a way to get all the relief sought in another forum.

From the preceding discussion in both the majority and dissenting opinions, it is obvious that this litigation has turned into an extraordinarily complex exercise in judicial theory. The trial court's decision to deny intervention because it would unnecessarily delay this litigation has proved highly prophetic. The most responsible decision for this court would be to dismiss this appeal.

V

An entirely separate reason to dismiss the appeal is to look at the case from the defendant's viewpoint. After a prolonged and strenuous trial and appeal, it was determined that the applicants for employment at Western were not a proper class, and the judgment of the district court that Western had discriminated in terms and conditions of hiring was vacated. This judgment was made final by the Supreme Court's denial of certiorari in the case. At that point, Western had won that aspect of the litigation, although it had lost others. Now, by way of intervention, Western has lost the case it had just won if the district court's initial findings are reinstated, as they probably will be.

With all deference to the opinion of my colleagues, I think the majority decision amounts to no less than a simple failure by this court to follow *Rodriguez*. Of what use is binding precedent that a man may not litigate for a class to which he does not belong if it may be avoided by the simple artifice of intervention after an adverse decision?

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-1279

OLLIE T. HILL, JOHN W. WARD, CHARLES R. MERRIWETHER, JR., EDWARD A. MINATEE, MINNIE MARBLE, MARY E. CARTER, Individually and on behalf of all other persons similarly situated,

Appellants,

vs.

WESTERN ELECTRIC COMPANY, INC.,

Appellee,

EQUAL EMPLOYMENT ADVISORY COUNCIL,

Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated and this case is remanded to the United States District Court for the Eastern District of Virginia at Alexandria for further proceedings consistent with the opinion of this court filed herewith.

[Filed Mar. 1, 1982]

/s/ William K. Slate II
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1279

OLLIE T. HILL, *et al.*,
Appellants,

versus

WESTERN ELECTRIC COMPANY, INC.,
Appellee.

EQUAL EMPLOYMENT ADVISORY COUNCIL,
Amicus Curiae.

ORDER

Upon consideration of the appellee's petition for rehearing, by counsel,

IT IS ORDERED that the petition for rehearing is DENIED.

Entered at the direction of Judge Phillips. Judge Russell, Judge Widener, Judge Hall and Judge Chapman dissent from the denial of rehearing en banc.

For the Court,

/s/ William K. Slate, II
Clerk

[Filed May 28, 1982]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 75-375-A

OLLIE T. HILL, *et al.*,
Plaintiffs,

v.

WESTERN ELECTRIC CO., INC.,
Defendant.

TRANSCRIPT OF PROCEEDINGS
Alexandria, Virginia

February 8, 1980

Before: THE HONORABLE ALBERT V. BRYAN, JR.,
United States District Judge

• • • •

THE COURT: I'm not satisfied that the terms of the remand preclude the Court from allowing intervention at this stage. And I believe that it's discretionary.

But I'm going to exercise that discretion in favor of denying the application for intervention for these reasons:

First, this action was filed in May of 1975. It was tried in February of 1976 on the question of liability. The question of liability was decided in April of '76.

And while there was some—there was a subsequent decree on the carrying out of the damage aspect of it and the fixing of attorneys' fees, the liability adjudication was stayed pending procedures in the Court of Appeals and subsequently in an application for certiorari.

It's time this case got concluded. Two of the prospective intervenors applied for and were denied employment in August of 1979. The third was earlier. I think there may be some problems with the timeliness of that third intervenor's EEOC and this Court's consideration of her claim.

But whether that is timely or isn't, it is going to occasion a hearing on the matters. Things in this case have never been characterized by brevity. And while it is possible to have the hearing that the Court of Appeals did affirm, that is, with the job assignments and shop trades and relating, and the warehouse in the service center go forward on the question of fixing their back pay entitlements, while this Court is simultaneously considering the intervenors' claims, I think this case has had its opportunity for full hearings and ought to be concluded.

And it's impractical if not impossible to be running part of the case here and part before the master on the job assignments claims.

The intervention will, therefore, be denied. I do direct counsel, though, to submit to me by next week a decree relating to job assignments in the shop trades with relation to blacks and females and in the warehouse with respect to females.

I want to get this case on its way. And that part of the Court of Appeals' decision can be carried out forthwith. And I expect it to be.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 75-375-A

OLLIE T. HILL, *et al.*,
Plaintiffs,

v.

WESTERN ELECTRIC CO., INC.,
Defendant.

ORDER

For the reasons stated from the bench, the Motion for Leave to Intervene as Parties Plaintiff and the Motion to Amend the Complaint (Or, in the Alternative, to Obtain Joinder of New Plaintiffs) are denied.

/s/ Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
February 8th, 1980

U.S. CONSTITUTION art. 3, § 2

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * *

FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

* * * *

Rule 24. Intervention

* * * *

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Office - Supreme Court U.S.
FILED
OCT 7 1982
ALEXANDER L. STEVAS

No. 82-393

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WESTERN ELECTRIC COMPANY, INC., *Petitioner*,

v.

OLLIE T. HILL, *et al.*, *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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October 7, 1982

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTIONS PRESENTED

1. Was the court below correct in holding that class members in an employment discrimination case may seek post-trial to intervene as class representatives where they moved to intervene as soon as it became apparent that the original class representatives lacked standing to represent them, and where no party would be prejudiced by intervention?

2. Was the court below correct in holding that the district court is not without discretion, upon remand of the case, to reinstate its findings of hiring discrimination, which had been vacated solely because the original class representatives lacked standing to represent the class, if it finds, *inter alia*, the proposed intervenors to be adequate class representatives and allows them to intervene, and if it determines that no party will be prejudiced by the reinstatement?

3. Did the court below apply a proper standard of appellate review in finding that the reasons given by the district court for denying intervention were either without foundation in the record or inadequate as a matter of law?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-393

WESTERN ELECTRIC COMPANY, INC., *Petitioner*,

v.

OLLIE T. HILL, *et al.*, *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondents hereby respond to and oppose Petitioner Western Electric Company, Inc.'s petition that a writ of certiorari issue to review the judgment and opinion of the Fourth Circuit Court of Appeals entered on March 1, 1982.

STATEMENT OF THE CASE

The original complaint in this case was filed on May 14, 1975 by six black and female present or former employees of Western Electric Company, Inc. ("Western Electric" or "Western"), who claimed that Western unlawfully discriminated against blacks and females in hiring, job assignments and promotions, contrary to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.*, and Section 1 of the Civil Rights Act of 1966, 42 U.S.C. § 1981. The United States District Court for the Eastern District of Virginia (Hon. Albert V. Bryan, Jr.), based on the Fourth Circuit Court of Appeals' decision in

Barnett v. *W. T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975), certified a class, on November 21, 1975, consisting of all blacks and all females who unsuccessfully sought or would seek employment, or who had been employed, at Western's Arlington, Virginia facility at any time since July 2, 1965.[1]

This case was tried to the bench in February 1976, following a period of extensive pretrial discovery. On April 30, 1976, Judge Bryan issued a Memorandum Opinion in which he found Western guilty of unlawful race and sex discrimination in hiring, job assignments and promotions. With respect to discrimination in hiring, all the jobs at issue were unskilled jobs for which no prior training or experience were required, and the district court found, *inter alia*, that

> a) Western hired only 12.7% of the black applicants for unskilled, entry-level service center jobs as compared to 29.8% of the white applicants; *Hill* v. *Western Electric Co.*, 12 FEP Cas. 1175, 1179 (E.D. Va. 1976), and that
>
> b) Western hired only 17.9% of the black applicants for unskilled entry-level installer jobs as compared to 45.7% of the white applicants . . . . *Id.*

The district court further found that Western Electric relied upon an invalid and unfair preemployment test to screen applicants for employment as installers which had

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[1] The Arlington, Virginia "facility" had responsibility for employees at Western Electric's Washington Service Center (the "Service Center"), which served to store, assemble, and repair telephones in the Washington metropolitan area and for the Washington Installation District, which covered Washington, D.C. and its Virginia and Maryland suburbs and was responsible for installing telephone equipment at AT&T operating subsidiaries and other locations.

a severe adverse impact on blacks: "Only 23.5% of the blacks who took the 'Installer's Test Battery' . . . passed, while 57.6% of the whites who took the test battery passed." *Id.* at 1180.

On October 21, 1976, Judge Bryan issued a remedial decree, setting forth the relief to be afforded to class members. This decree was amended by an order dated November 2, 1976.

On appeal, the Fourth Circuit Court of Appeals affirmed Judge Bryan's findings as to Western's race and sex discrimination in job assignments in the Service Center but reversed the district court's findings as to discrimination in promotions. *Hill* v. *Western Electric Co.*, 596 F.2d 99 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979) *("Hill I")*. With respect to Western's discrimination in hiring, the court concluded that at the time of certification and the district court's decision the existing law in the Fourth Circuit, under *Barnett* v. *W. T. Grant Co.*, *supra*, was such that the named plaintiffs, all of whom had been hired by Western, arguably could represent those not hired. 596 F.2d at 101. It found, however, that the law had since changed, and that under the subsequent decision of this Court in *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), the named plaintiffs lacked standing to represent unsuccessful applicants for employment or to challenge Western's hiring practices. 596 F.2d at 101-02. On this basis, the court vacated Judge Bryan's findings as to hiring discrimination without considering the merits of those findings.

On January 17, 1980, upon remand of the case to the district court, three members of the class who had been denied employment by Western filed a motion to intervene, with supporting affidavits and a memorandum of law, on their own behalves and as representatives of

other unsuccessful applicants for employment who, pursuant to the Court of Appeals' April 9, 1979 decision, could not then be represented by the original named plaintiffs. All three proposed intervenors were already members of the class certified by Judge Bryan on November 21, 1975, a class which included "all black persons and all female persons who have applied for employment at Defendant's facility in Arlington, Virginia since July 7, 1965, or who will hereafter apply."

As set forth in their affidavits, two of the proposed intervenors alleged that they were required to take and pass the same preemployment test for installers that the district court found discriminatory, and declared unlawful, in April 1976. They were informed by Western that their applications were denied because they failed to pass this test. The third proposed intervenor alleged that Western's refusal to hire her at the Service Center in 1973 was the result of discriminatory personal interviews, which have continued, without interruption, to the present. Thus, the claims of the proposed intervenors were identical to the claims of discrimination in hiring raised, and previously litigated, by the named plaintiffs. Judge Bryan issued a ruling from the bench at the conclusion of oral argument, on February 8, 1980, denying the motion to intervene.

The district court did not consider whether the intervenors were adequate class representatives. Rather, it held that intervention was inappropriate primarily because of the length of time the case had gone on. The district court judge felt that "[i]t's time this case got concluded." (App. 41a)[2] The judge also felt that it would

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[2] "App." references are to the Appendix to Western Electric's Petition for a Writ of Certiorari. "Pet." references are to the text of Western Electric's Petition for a Writ of Certiorari.

be impractical for him to consider the hiring claims at the same time that other portions of the case, on which the Fourth Circuit had affirmed the findings of liability, were before a special master on the issue of damages. *(Id.)*

The Fourth Circuit in its decision below held that these two reasons were, as a matter of law, an insufficient basis for denying intervention. The court noted that under well-established precedent, the mere passage of time does not, in and of itself, constitute a sufficient basis for denying a motion to intervene under Rule 24(b). (App. 5a) The critical inquiry, the court held, is whether the intervenors moved to intervene in a timely fashion and whether intervention would prejudice any party. (App. 5a-7a)

The court below found that the proposed intervenors had acted in a timely fashion in that they had moved to intervene in order to protect their interests as soon as it became clear, following *Hill I*, that the original named plaintiffs could not do so. (App. 6a)

Even more importantly, the court said, intervention would not result in prejudice to any party. The court noted that Western Electric had been aware from the outset of the action that it might be liable to the class on hiring claims, and thus could not claim any prejudice from the effort of class members to intervene. (App. 7a) Indeed, Western has never claimed, and does not claim in its present petition, that it would be prejudiced in any fashion by intervention.

The court next considered whether intervention would prejudice any of the members of the class whose claims had been affirmed in *Hill I* and were, at the time of the district court's decision, to have been placed before a

special master on the issue of damages.[3] The Fourth Circuit held that this bifurcation of the proceedings would not have worked a prejudice on the members of the class. The court noted that while the district court had found such a procedure to be "impractical if not impossible," neither it nor Western Electric had offered any reasons why this should be so. (App. 7a) The Court of Appeals found the district court's finding of impracticality to be unsupported and contrary to precedent in equal employment cases, where bifurcation of cases is "commonplace." (App. 7a-8a)

The court also found that in considering the motion to intervene, the district court failed to consider the possibility that it might reinstate its original findings of hiring discrimination to the extent the claims were previously adjudicated. If reinstatement occurred, the court noted, it would save the proposed intervenors and the district court from having to relitigate those issues and promote judicial efficiency. If the district court found that reinstatement would be proper, the Court of Appeals held, it would be a factor weighing in favor of allowing intervention. (App. 8a-9a) The court indicated that reinstatement of the findings would only be appropriate so long as no party had been prejudiced by the original named plaintiffs' lack of standing to represent the class. (App. 9a-10a)

The Court of Appeals remanded the case to the district court for further consideration of the motion to intervene. The court noted, however, that Western Electric had

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[3] These aspects of the case, as well as all other aspects except for the hiring claims, were in fact subsequently the subject of a settlement between plaintiffs and Western Electric.

raised a number of procedural and jurisdictional issues regarding the ability of the proposed intervenors to sue, wholly apart from any issues regarding the propriety of intervention, and that the district court never addressed these issues.[4] The court directed the district court to address those issues "as a preliminary" to any consideration of the propriety of intervention, class certification, or of the reinstatement of the findings. Only if the district court rules for the proposed intervenors on these "preliminary" issues, the court held, should it proceed to any consideration of intervention and reinstatement of the findings.[5] (App. 13a-15a)

REASONS FOR DENYING THE WRIT

Western Electric attacks the Fourth Circuit's decision on three grounds. First, Western contends that the court's decision is contrary to decisions of this Court and of the other lower courts. Second, Western asserts that the decision below will promote "spurious class actions." Finally, Western claims that the Court of Appeals ignored proper standards of appellate review in reversing the district court.

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[4] These issues include whether two proposed intervenors who applied in Landover, Maryland applied at a "successor facility" of the Arlington facility originally at issue in the case; whether another proposed intervenor's claim is time-barred; and whether Western had an adequate notice of and opportunity to conciliate the hiring claims.

[5] Western's applications for a stay of the Fourth Circuit's mandate were denied by the Fourth Circuit on June 3, 1982 and by Chief Justice Burger on June 23, 1982. This case is now before the district court on remand. Discovery with respect to the intervention motion is scheduled to be concluded on October 15, 1982, and a hearing on the motion is expected to be conducted in November.

These contentions are without merit. The decision of the Court of Appeals raises no issues that merit consideration by this Court. It is fully consistent with the decisions of this Court and other lower courts and raises no questions of exceptional importance.

I. THE DECISION OF THE COURT OF APPEALS IS FULLY CONSISTENT WITH THIS COURT'S DECISIONS AND THOSE OF OTHER LOWER COURTS

Western Electric argues that the decision below is in conflict in three different ways with decisions of this Court and of the other lower courts. There are, in fact, no such conflicts.

A. The Decision Below Is Consistent With This Court's Decisions In *Falcon* and *Rodriguez*

Western's first contention is that the Court of Appeals' holding that the district court should reconsider the motion to intervene is inconsistent with this Court's decisions in *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977), and *General Telephone Co. of the Southwest* v. *Falcon*, 102 S. Ct. 2364 (1982). Those cases hold that under Rule 23(a) of the Federal Rules of Civil Procedure a named plaintiff in a class action must, in his individual claim, raise issues of law or fact that are in common with and typical of the class claims. Thus, this Court held in *Falcon* that an individual who had alleged discrimination by a company in promotions could not represent individuals discriminated against in hiring, unless he could demonstrate that his claim of discrimination in promotions shared issues of law or fact in common with the hiring discrimination claims. 102 S. Ct. at 2371.

The Court of Appeals in this case was well aware of these principles. In fact, the Fourth Circuit's prior decision in this case in *Hill I*, in which it held that named

plaintiffs discriminated against by Western in promotions could not represent a hiring discrimination class, anticipated this Court's decision in *Falcon*.

The mandate of the Court of Appeals is fully consistent with this Court's decisions in *Falcon* and *Rodriguez*. The court has simply directed the district court to consider whether the proposed intervenors will in fact be appropriate representatives of those discriminated against in hiring by Western. On remand, the district court will conduct the "rigorous analysis" required under Rule 23(a) to determine if these proposed intervenors have raised issues of law or fact in common with that class and have asserted claims typical of the class.

Western does not dispute that intervention will only be allowed here if it is found that the proposed intervenors meet the commonality and typicality requirements of Rule 23, as construed in *Falcon* and *Rodriguez*. Rather, what Western contends is inconsistent with *Falcon* and *Rodriguez* is the court's holding below that if the district court allows intervention it would not necessarily be precluded from reinstating its findings of hiring discrimination by Western.

Western argues that under *Falcon* and *Rodriguez* the absence of proper named plaintiffs before the district court at the time of trial renders the district court's findings fatally flawed and incapable of reinstatement. (Pet. at 9-10)

There is no basis for this contention. As discussed in the next section, this Court has specifically held that the absence of proper named plaintiffs does not necessarily render the proceedings in a case a complete nullity. So long as the interests of those whom the plaintiffs sought to represent were adequately represented, so long as the lack of proper plaintiffs did not prejudice the defendants,

and so long as proper plaintiffs intervene, the proceedings may, upon certain circumstances, be given effect. *See Mullaney* v. *Anderson*, 342 U.S. 415 (1952).

This Court did not suggest in *Falcon* or *Rodriguez* that the lack of commonality or typicality between named plaintiffs' claims and those of the class would necessarily mean inadequate representation of the class members or that the defendants would suffer prejudice. This Court's primary concern, rather, was that in the absence of proof of commonality and typicality the goal of judicial efficiency that underlies the class action procedure would not be served. *See General Telephone Co. of the Southwest* v. *Falcon*, *supra*, 102 S. Ct. at 2370, 2372.

It may be, of course, that in some cases the absence of proper representatives will lead to inadequate class representation or will prejudice the defendant. But in this case the Court of Appeals found no such prejudice and, indeed, Western points to none. In the absence of any such prejudice, there is no reason why the district court should not be able, upon the addition of proper representatives, and provided the other conditions are met, to reinstate its findings of hiring discrimination.

In attempting to create a conflict between the decision below and *Falcon*, Western also makes much of the fact that this Court has recently remanded the case of *Brown* v. *Eckerd Drugs, Inc.*, 663 F.2d 1268 (4th Cir. 1981), to the Fourth Circuit for reconsideration in light of *Falcon*. *See* 102 S. Ct. 2952 (1982). Western attempts to piggyback on that decision by claiming that this case "is a sister case to *Brown* and rests on precisely the same doctrinal footing" (Pet. at 8), and should therefore also be remanded for reconsideration in light of *Falcon*.

This case has nothing to do with *Brown*. In *Brown* the court held that certain named plaintiffs who had claimed

discrimination in being dismissed or demoted had standing to challenge other discriminatory practices of the defendant. *See* 663 F.2d at 1274-77. This Court remanded the case for reconsideration of that finding in light of *Falcon*.

Western attempts to make this case into a "sister case" of *Brown* by arguing that both cases "involved situations where named plaintiffs were improperly allowed to litigate overly broad class claims." (Pet. at 10 n.13) What Western does not mention is that in *Brown* the Fourth Circuit allowed the plaintiffs to litigate overly broad claims, requiring this Court to remand the case for reconsideration in light of *Falcon*. In this case the Fourth Circuit itself held in 1979, in *Hill I*, that the plaintiffs were improper representatives. That decision became final in 1979 and was not before the Fourth Circuit in this appeal. Thus, the issue on which remand was granted in *Brown* ceased to be a part of this case three years ago, and was in fact decided consistently with *Falcon* at that time.[6]

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[6] Western also contends that both cases involved "post-trial intervention by a party for purposes of preserving favorable findings of fact." (Pet. at 10 n.13). While this issue is involved in this case, it was not a factor in the *Brown* remand. Although a class member did intervene in *Brown*, the Fourth Circuit held that in light of its finding that the original plaintiffs were proper, it did not have to consider whether the intervention would have cured a lack of standing by the original plaintiffs or allowed for preservation of the findings of fact in those circumstances. *See* 663 F.2d at 1275.

B. The Holding Below That Findings Of Hiring Discrimination May Be Reinstated Is Consistent With Decisions Of This Court And Of Other Lower Courts

Western Electric maintains that where a court renders findings, even though it lacked jurisdiction to do so, or even though improper named plaintiffs were before it, those findings are a complete nullity, and that even if the defect in jurisdiction or standing is cured, the court is without power to reinstate its findings. Western suggests that the holding below that reinstatement may be possible is an "exceptional" holding in conflict with decisions of this and other courts.

This is incorrect. It is well established that a defect in jurisdiction or in standing that does not prejudice the parties does not render the proceedings before the court null and void. Once the defect is corrected, and jurisdiction or standing restored, the proceedings may be given full effect.

One of the leading cases on this point is *Finn* v. *American Fire & Casualty Co.*, 207 F.2d 113 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954). In *Finn* it was determined after trial that the court had not had jurisdiction to hear the case before it because of a lack of complete diversity among the parties. On remand, the plaintiffs moved to dismiss certain parties, thereby perfecting diversity and giving the court jurisdiction. The trial judge, however, refused to reinstate his prior findings, holding that since he had been without power to issue them in the first place, he could not reinstate them. The Fifth Circuit reversed, holding that the action taken by the plaintiff to give the court jurisdiction related back to the time of the original action. So long as the defendant had not been prejudiced by the jurisdictional error, the court held, there was no reason why the correction should not be given retroactive effect. To do otherwise would, the court

said, be a tremendous waste of judicial resources. *Id.* at 114-16.

In *Eklund* v. *Mora*, 410 F.2d 731 (5th Cir. 1969), the Fifth Circuit applied *Finn*, holding that the case stands for the proposition

> "That where a first trial was free from error apart from a jurisdictional matter, a new trial was not mandatory and judgment could be entered on the original verdict after the correction of the jurisdictional flaw by the dismissal of a non-diverse defendant." *Id.* at 732.

In *Dunlop* v. *Rhode Island*, 398 F. Supp. 1269 (D.R.I. 1975), the court held that it could adopt the findings and conclusions it had previously reached, even though it lacked jurisdiction at the time it reached them. The *Dunlop* court, in adopting its previous findings, stated, in language equally applicable here, that it could see "no useful purpose in re-examining the evidence and redetermining its findings." *Id.* at 1273.

This Court has taken an identical approach with respect to the type of defects in standing at issue here. In *Mullaney* v. *Anderson*, *supra*, a fishermen's union and its secretary-treasurer sued to enjoin the Alaska tax commissioner from collecting certain fees from out-of-state fishermen. After trial, and after an appeal to the Ninth Circuit, which resulted in a victory for the plaintiffs, the defendant, in its appeal to this Court, "for the first time . . . questioned the standing of respondent union and its Secretary-Treasurer to maintain this suit." 342 U.S. at 416. In response, the plaintiffs moved to allow the addition of two plaintiffs who had standing. This Court allowed the addition of the plaintiffs, holding that their addition would not "embarrass the defendant" and that their earlier joinder would not have affected the

course of litigation. The Court noted that the original plaintiffs had been acting on behalf of the new plaintiffs. Thus, the Court held, to allow addition of these plaintiffs "merely puts the principal, the real party in interest, in the position of his avowed agent." *Id.* at 417. The original plaintiffs here were, likewise, acting on behalf of the proposed intervenors, each of whom is a member of the class represented at trial, even though, like the plaintiffs in *Mullaney*, they lacked standing to do so. The addition of these intervenors at trial would not have affected the course of litigation.[7] The trial was conducted on the class issues only, and not on the individual claims of the class representatives. The substitution of these class members for their former agents thus works no prejudice on the defendant.

Mullaney conclusively demonstrates that the lack of standing by plaintiffs to raise certain issues does not render the court's ruling on those issues null and void, so long as the defect in standing is corrected and did not prejudice the defendant. The *Mullaney* Court noted that the alternative to such a rule would be to dismiss the action. This Court found that untenable, since

> "[t]o dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration." *Id.* at 417.

The same holds true here. The alternative to allowing the original defect in standing to be cured would be to dismiss the action and compel the proposed intervenors to start from scratch in the pursuit of relief from Western.

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[7] If, in fact, their addition would have affected the prior litigation, Western is afforded an opportunity to present such arguments to the district court upon remand.

Western contends that whatever the validity of *Finn* and similar cases, those cases have been undercut by this Court's recent decision in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981). In *Firestone* this Court affirmed a decision of the Eighth Circuit that it did not have the power to hear an interlocutory appeal of an order denying a motion to disqualify counsel. The Eighth Circuit had held, however, that it would only apply its holding prospectively, and thus proceeded to decide the merits of the case before it. This, the Court said, was improper. This Court held "that because the Court of Appeals was without jurisdiction to hear the appeal, it was without authority to decide the merits." *Id.* at 379 (footnote omitted).

Based on this rather unremarkable observation that a court cannot decide matters outside of its jurisdiction, a principle surely known at the time of *Finn*, Western contends that the district court's consideration of the hiring issues is a nullity. *Firestone* stands for nothing of the sort. Obviously, a court that lacks jurisdiction, or which has plaintiffs without standing before it, cannot decide issues. And any such decisions that are made while the defect was present are properly vacated.[8] The question presented here is whether, once that defect is corrected, and the court acquires jurisdiction, or plaintiffs with standing intervene, its previous actions are a nullity which must be completely ignored or, rather, are capable under certain circumstances of being reinstated. This issue never arose in *Firestone*, since the jurisdictional defect was not curable. *Mullaney*, *Finn*, and similar

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[8] This, likewise, is all that the portion of *Blum* v. *Yaretsky*, 102 S. Ct. 2777 (1982), relied on by Western (Pet. at 21), stands for.

cases demonstrate, however, that if the defect did not prejudice litigation of the case, and the defect is cured, the court's actions need not be null and void. This is all that the court below held here.

Western also places great reliance on a series of cases that hold that a judgment that is vacated, whether because the court lacked jurisdiction or otherwise, is void and has no precedential or *res judicata* effect. (Pet. at 23) These cases have no bearing on the issue here. The question is not whether the judgment, once vacated, has any effect. It obviously does not. The question is whether, where a judgment is vacated for jurisdictional reasons, the court that entered the judgment can, once it acquires jurisdiction, readopt the judgment.[9]

The sole cases relied on by Western for the proposition that reinstatement may not take place are *DeNafo* v. *Finch*, 436 F.2d 737 (3d Cir. 1971) and *City and County of Denver* v. *Matsch*, 635 F.2d 804 (10th Cir. 1980). (Pet. at 23-24) Western's reliance on *DeNafo* for this proposition is puzzling, since it nowhere discusses the issue. As for *City and County of Denver*, it does not deal with

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[9] It is highly instructive to note that in its briefs in both the district court and the Court of Appeals, Western Electric also grouped among these cases *Dunlop* v. *Rhode Island*, *supra*. In *Dunlop*, the court held that findings that have been entered by a court that lacks jurisdiction do not have precedential or *res judicata* value. That is all that Western's cases stand for. But in *Dunlop* the court went on to hold, as discussed above, that it could nonetheless reinstate those findings once it acquired jurisdiction. It is that second step that is at issue here. *Dunlop* makes clear that the cases cited by Western are in no way inconsistent or in conflict with the decision below. Apparently, now that this has three times been pointed out to Western in briefs before the district court and Court of Appeals, it has chosen to drop *Dunlop* from its litany of cases.

reinstatement of findings of fact. In *City and County of Denver* a citizens' group sought to challenge the display of a nativity scene on public property. The Court of Appeals found, following an evidentiary hearing on the matter in the district court, that the citizens' group lacked standing to sue, and ordered the district court to vacate its judgment. On remand, the district court attempted to provide the citizens' group with an opportunity to present evidence demonstrating its standing to sue. On petition for a writ of prohibition, the Tenth Circuit held that the citizens' group had been given an opportunity to prove standing and, having failed to do so, would not be given a second chance. *Id.* at 807-08. That situation is not the one presented here, where under legal standards existing at the time of trial the plaintiffs did have standing and it only became apparent, after trial and a change in legal standards, that standing did not exist. An opportunity has never been presented for the class to seek to meet these legal standards, and they should be provided with that opportunity now. *Compare Sierra Club* v. *Morton*, 405 U.S. 727, 735-36 n.8 (1972), *on remand*, 348 F. Supp. 219 (N.D. Cal.) (Plaintiff given opportunity to amend complaint and add parties after this Court held, in resolving a previously unaddressed question, that plaintiff lacked standing).[10]

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[10] The court below recognized that this case involves the circumstance, anticipated by this Court in *Rodriguez*, where it only becomes apparent after trial that the named plaintiffs are improper representatives. Under such circumstances, this Court said, the class claims need not be destroyed. (*See* App. 12a n.4)

C. The Court Below Did Not Hold That "Success On The Merits" Cures Rule 23 Standing Defects

Western attempts to conjure up a conflict in the circuits by contending that the court below held "that success on the merits magically cures all defects in class composition and representation, and thus permits reinstatement of unreviewed findings on issues not properly litigated." (Pet. at 11) Western seeks by this misstatement of the court's holding to cast it in conflict with cases that have held that success on the merits does not demonstrate that plaintiffs are adequate class representatives.

The Court of Appeals did not hold that success on the merits by the original named plaintiffs cured anything.[11] Rather, it held that the defects in class composition and representation might be resolved if, and only if, the proposed intervenors can demonstrate that they are adequate Rule 23 representatives and can delineate a proper class for certification.[12] The court recognized that the original named plaintiffs were *not* proper representatives, and that this defect was not cured in any way by their success in representing the class.

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[11] The Court of Appeals' sole discussion of success on the merits came in the context of its discussion of whether reinstatement of the findings would be prejudicial to any party. The court noted that any claim of prejudice to the class was belied by the fact that the class was successful in its claims. (App. 16a) The court never even implied, however, that this success rendered the original named plaintiffs proper Rule 23 representatives or vitiated the need for the proposed intervenors to demonstrate independently that they are proper representatives.

[12] Western notes that in *Payne* v. *Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982), the court, after holding that the original named plaintiffs did not have standing to represent the entire class, denied a petition for reconsideration seeking a modification to make it clear that new plaintiffs with standing could intervene. Western

II. THE DECISION BELOW WILL NOT GIVE RISE TO "SPURIOUS CLASS ACTIONS"

Western suggests that the Court of Appeals' decision would allow courts to certify broad classes, regardless of the scope of the named plaintiffs' claims, and then allow proper named plaintiffs to come forward after judgment to cure the defect. Western contends that this would open the door to "spurious class actions" and "one-way intervention."

Western's argument is that "the Fourth Circuit has established a form of class representation that grants any litigant a trial run on any class action claim, and then permits class counsel, if successful on the merits of claims that should not have been litigated in the first instance, to obtain intervenors and thereby legitimate the proceedings." (Pet. at 15)

Western paints a scenario where clever class counsel will make sure that they have improper class representatives so that in the event they lose their case the class can claim inadequate representation but can, in the event they win, intervene with proper class representatives and preserve the findings.

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concludes from this that the Fifth Circuit has now held that the possible intervention approved by the Fourth Circuit here has been rejected by the Fifth Circuit.

In fact, the Fifth Circuit, in its original decision in *Payne*, took no position as to what the district court should do on remand with respect to intervention. The court's denial of a petition for rehearing cannot be read as a rejection of intervention as one option. This posture was in fact precisely the posture adopted by the Fourth Circuit in *Hill I*, and neither the district court nor the Fourth Circuit has read such a position to mean that intervention is precluded. *See* n.16, *infra*.

In Western's scenario, class counsel will engage in "gamesmanship" to assure that they will be protected from an unfavorable outcome. Indeed, Western implies that counsel for respondents herein engaged in such gamesmanship by not bringing forth proper named plaintiffs at the outset of the trial in this case, even though there is "no reason" why they could not have done so. (Pet. at 18)

This entire argument is baseless. It rests on the assumption that class counsel *and* the district courts will cavalierly ignore the representation rules laid down by this Court in *Falcon* and *Rodriguez*.

There is absolutely no reason to believe that this will occur. A court, even if it certified an overly broad class in the first instance, would still have to determine after trial, and before judgment, that there were class representatives capable of representing the class in accordance with Rule 23, as construed in *Falcon* and *Rodriguez*. Western does not explain why a court would choose not to comply with the rules set forth in those cases in certifying a class in the first place, nor why a court would ignore the requirement of proper named plaintiffs throughout the trial of a class action and before entering judgment. The only reason the district court did not conform to *Rodriguez* in certifying the class in this case is that *Rodriguez* was not decided until over a year after the court handed down its decision on the merits. Under the law of the Fourth Circuit as it stood throughout the trial, the district court's certification order was correct. *See Hill I*, 596 F.2d at 101. This case thus presents unusual circumstances, involving the impact of a subsequent change in law, that are hardly likely to be repeated, and certainly not in the fashion Western suggests.

III. THE COURT BELOW APPLIED A PROPER STANDARD OF REVIEW IN REVERSING THE DISTRICT COURT

Western contends that the Court of Appeals applied an improper standard of review in reversing the district court. Western's argument is that the Court of Appeals substituted its factual judgment for that of the district court. (Pet. at 25)

This is incorrect. The court did not substitute its view of the facts for the district court's. The district court had given two reasons for denying intervention. As to the first, the Court of Appeals held that the mere fact that the case had been going on for a long time was, as a matter of law, an insufficient basis for denying intervention.

As for the second reason, the impracticality of bifurcating the case, the Court of Appeals found that there was absolutely no evidence in the record to support the district court's conclusion that bifurcation of the case would be too difficult. (App. 7a-8a)[13]

The Court of Appeals did not supplant findings of fact by the district court with its own. It did find that the

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[13] Western states that the Court of Appeals "recognized that additional litigation, delays, and prejudice would result from intervention . . . but concluded that such prejudice 'was given greater weight [by the district court] than *general experience warrants*.' " (Pet. at 5 n.6) This is an incredible mischaracterization of the decision below. The district court had concluded that bifurcation would be "impractical." The Court of Appeals held that "the impracticality envisioned was given greater weight than general experience warrants." (App. 8a) It never found that bifurcation would result in *any* prejudice. To the contrary, it expressly found that "[a]ny prejudice to other members of the class *could have been avoided*, however, by simply bifurcating the proceedings." (App. 7a) (emphasis added)

conclusions drawn by the district court were either legally incorrect or factually unsupported on the record.[14]

IV. THE COURT OF APPEALS' DECISION IS NOT RIPE FOR REVIEW BECAUSE OF THE PRELIMINARY LEGAL AND FACTUAL DISPUTES THAT REMAIN FOR RESOLUTION UPON REMAND

Finally, it should be emphasized that the appellate court found the present record significantly lacking in that the district court never addressed certain "preliminary" issues regarding the ability of the proposed intervenors to sue. Nor has the district court yet determined whether the proposed intervenors meet the rigorous requirements of Rule 23.

These issues were never addressed by the district court and may be dispositive of this case on remand before the district court even considers whether intervention or reinstatement is appropriate.[15] The Court of Appeals has

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[14] Western also claims that the Court of Appeals improperly added as a factor to be considered in ruling on the intervention motion the possibility of reinstatement of the findings. Western contends that this is precluded by the language of Rule 24(b), and that the court is limited to considering the timeliness of the motion, the common questions of law or fact raised by the intervenor, and prejudice to existing parties. In fact, Rule 24(b), while directing the courts to consider those criteria, by no means makes those the exclusive factors to be considered. It is clear, for example, that "[t]he court also will consider whether the applicant will benefit by intervention." 7A C. Wright & A. Miller, *Federal Practice and Procedure* § 1913, at 554 (1972). It was plainly proper for the Court of Appeals to direct that the benefits to the intervening class members from possible reinstatement be considered.

[15] Western argues that this case is ripe for appeal because, it speculates, had the court below not found reinstatement to be possible under certain circumstances, it would not have reversed the district court and remanded the case for further consideration of the

not stated that intervention or reinstatement should take place. It has merely directed the district court to give further consideration to such matters.[16] Given the current state of the record, which shows that intervention and reinstatement is only a possible outcome, and one that may never be considered, let alone reached, this case is particularly unsuited for review by this Court.

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preliminary issues or of the qualifications under Rule 23 of the intervenors. (Pet. at 7 n.8) The fact is, however, that, as found by the Court of Appeals, the two reasons given by the district court for denying intervention were totally without foundation in the record and were insufficient reasons for denying intervention. (*See* App. 5a-8a)

[16] Western contends that it is improper for the court below to have even allowed reconsideration of these matters because, it argues, the Court of Appeals already disposed of the hiring claims finally in its prior decision in *Hill I*. Western argues that in allowing the district court to consider intervention and reinstatement of the judgment with respect to hiring discrimination, the Court of Appeals has effectively overturned its previous decision, in violation of the doctrine of the law of the case. (Pet. at 20 n.28)

That contention is incorrect. If the Court of Appeals had wished in *Hill I* to render a final judgment effectively terminating the hiring portion of this case, it could have done so by dismissing that portion of the case, rather than remanding to the district court. It did not do so. It left the decision as to the subsequent disposition of the hiring claims to the district court. Judge Bryan expressly construed *Hill I* as not precluding him from considering intervention. (App. 40a) The Fourth Circuit construed its own mandate in precisely the same way. (App. 5a n.1) The actions taken by the district court and the Court of Appeals following remand were fully consistent with the Court of Appeals' original mandate.

CONCLUSION

For the foregoing reasons, Petitioner's petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WESTERN ELECTRIC COMPANY, INC.,
Petitioner,

v.

OLLIE T. HILL, *et al.*,
Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Western Electric Company, Inc., hereby replies to the brief of Respondents, submitted October 7, 1982, and argues in support of the Petition for a Writ of Certiorari filed in this case.

I. TWO RECENT DECISIONS BY THIS COURT HIGHLIGHT THE CONFLICT BETWEEN THE DECISION BELOW AND *EAST TEXAS MOTOR FREIGHT SYSTEM, INC. v. RODRIGUEZ* AND *GENERAL TELEPHONE CO. OF THE SOUTHWEST v. FALCON.*

Nothing in Respondents' brief alters or casts doubt upon the most important reason that this Court should grant the writ: the inconsistency between the decision below and this Court's holdings in *East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395 (1977) and, most critically, last term's decision in *General Telephone Co. of the Southwest v. Falcon*, 102 S. Ct. 2364 (1982). *See* Petition for a Writ of Certiorari (herein-

after "Petition"), at 6-11. Indeed, the conflict between the decision below and *Rodriguez* and *Falcon* has become even clearer since the petition for a writ of certiorari was filed.

On October 4, 1982, this Court vacated and remanded two cases, *University of Houston v. Wilkins*[1] and *County of Los Angeles v. Jordan*,[2] for reconsideration in light of *Falcon*. Both of these cases, like the Fourth Circuit's decision in *Brown v. Eckerd Drugs, Inc.*,[3] which also was vacated for reconsideration in light of *Falcon*, involved overbroad class representation by plaintiffs who were never class members, and whose claims were neither typical of, nor shared a common question of law or fact with, the claims of the class. These cases confirm that the requirements of Rule 23 are not "technical" or "formal," but are critical to the conduct of class litigation. Moreover, in *Wilkins*, as in *Brown*, the success of the named plaintiffs on the merits of claims they had no standing to litigate did not prevent this Court from overturning the judgment for failure to comply with the provisions of Rule 23.[4]

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[1] 51 U.S.L.W. 3252 (U.S. Oct. 4, 1982) (No. 81-1653), *vacating and remanding*, 654 F.2d 388 (5th Cir. 1981). *Wilkins* was also remanded for reconsideration in light of *Pullman-Standard v. Swint*, 102 S. Ct. 1781 (1982).

[2] 51 U.S.L.W. 3252 (U.S. Oct. 4, 1982), (No. 81-2189), *vacating and remanding*, 669 F.2d 1311 (9th Cir. 1982).

[3] 102 S. Ct. 2952 (1982), *vacating and remanding*, 663 F.2d 1268 (4th Cir. 1981). Since this Court's vacation of *Brown*, the Fourth Circuit has itself vacated and remanded that case to the district court, where new named plaintiffs have now moved to intervene based upon the decision in the instant case. No. 79-1821 (4th Cir. Aug. 31, 1982). This eventuality was anticipated in Western's Petition, at 11, note 14, and illustrates that the majority opinion below renders the requirements of Rule 23, as put by Judge Russell dissenting in *Brown*, "just a jumble of words stated in hypocritical mandatory terms." 633 F.2d at 1297.

[4] In *Wilkins* the appellate court found proof of discriminatory treatment of a sub-class of female professional and administrative

These cases, along with *Falcon* and *Rodriguez*, evidence this Court's determination that the requirements of Rule 23 are vitally important, and must be applied strictly in employment discrimination litigation. These cases stand in marked contrast to the decision below, where the Fourth Circuit simply ignored the inability of the named plaintiffs to satisfy three central requirements of Rule 23 (membership in the class, presentation of common questions of law or fact and presentation of typical claims) and held that failure to satisfy the prerequisites of Rule 23 created unimportant "formal" or "technical" defects. This error led to the central flaw in the decision below: that the presentation of claims of hiring discrimination by named plaintiffs who had not suffered discrimination in hiring created only a "technical" inadequacy of representation that was cured by the named plaintiffs' success on the merits.[5]

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staff members, who were not properly part of the class encompassed within the claims of the named plaintiffs. As with this Court's ruling in *Brown*, success on the merits of these improperly entertained claims did not excuse the named plaintiffs' failure to satisfy the requirements of Rule 23, and did not prevent this Court from vacating the judgment below. The decision of the Fourth Circuit in the instant case, allowing reinstatement of findings that were properly vacated because they were procured in derogation of Rule 23, is fundamentally at odds with these recent decisions by this Court.

[5] Respondents' claim that the Fourth Circuit did not so hold (Brief in Opposition, at 18) is mistaken. The majority below spent most of its opinion discussing the possibility of reinstatement, and throughout the discussion characterized the sole defect in the original trial as one of "inadequate representation." *See* Appendix to Petition, at 10a-12a, 15a-16a. Indeed, the majority below thought this such a critical point that it expressly instructed the lower court, in reconsidering the intervention motion, that the opinion in *Hill I* was based only upon this "technical" problem which was cured by success on the merits:

> Next, the court should take into account that this court's determination of inadequacy of representation on the first appeal was based entirely upon the formal lack of sufficient identity of interests between any class representatives and the non-hired

Respondents have neither addressed this flaw, nor the clear conflict between the decision below and cases in other circuits (Petition at 11-13),[4] nor the unresolved conflict within the Fourth Circuit as to the impact of Rule 23 upon employment discrimination litigation (Petition at 13-14). In this connection, Western would call this Court's attention to the Fourth Circuit's treatment of the *Brown* case on remand from this Court. The Fourth Circuit has merely vacated and remanded the case to the district court, where new named plaintiffs, relying on the opinion in this case, have now sought to intervene. The intra-circuit conflict noted by Western (Petition, at 13-15) thus continues, and the majority opinion in this case has provided a transparent method for dissatisfied plaintiffs to eviscerate the requirements of Rule 23 enunciated by this Court.

Rather than address these issues, Respondents have contented themselves with arguing that should intervention be allowed, the district court will be obliged to conduct a new class certification hearing wherein the strictures of *Falcon* and *Rodriguez* will be observed. (Brief in Opposition, at 9-10). A second hearing, however, cannot possibly justify reinstatement of findings that were procured in plain violation of the provisions of Rule 23 and Article III of the Constitution, and were void *ab initio*. The entry of new named plaintiffs representing a new

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members of the class. *See Hill v. Western Electric Co.*, 596 F.2d at 101-02. We did not then address the question of the actual effectiveness of the representation notwithstanding its formal inadequacy. When actual effectiveness is explored as a matter of first instance inquiry, it is obvious that the representation actually provided had all the indicia of diligence and practical effectiveness, including most notably that it yielded a favorable result on these class members' claims.

Appendix to Petition, 15a-16a (footnote omitted).

[4] Since the filing of the petition in this case, there have been petitions for a writ of certiorari filed in *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982), a case diametrically opposed to the decision below. *See* Petition, at 11-12.

class of rejected applicants, some six years after trial, cannot excuse the fact that the original trial of hiring discrimination claims was conducted without regard for the requirements of Rule 23. A new certification hearing cannot possibly alter the fundamental error in the decision below, which was that presentation of hiring claims by named plaintiffs who could not satisfy Rule 23's requirements with respect to a class of rejected applicants created only a "technical" or "formal" defect. The petition should be granted in order to rectify this fundamental Rule 23 and Article III jurisdictional error, and the possibility of a new class certification hearing in no way addresses the issue raised herein.

II. RESPONDENTS' EFFORTS TO REMEDY THE DEFECTS IN THIS CASE THROUGH INTERVENTION AND A NEW CLASS CERTIFICATION HEARING CANNOT BE COUNTENANCED.

The class certification hearing in this case was held in 1975. The certification decision was reviewed and revised by the Fourth Circuit in 1979, and this Court denied review of that decision.[7] This sequence confined the litigation to the claims that the original named plaintiffs had standing to present, and excluded claims of discrimination in hiring from this case. Now, nearly seven years after the initial certification hearing, the Fourth Circuit has provided Respondents with the opportunity for another certification hearing during which the issue of the scope of the litigation, decided long ago in a fashion plainly consistent with *Falcon* and *Rodriguez*, will be revisited. In their brief, Respondents claim that this bizarre result is not only proper, but will remedy the flaws in the original trial so as to allow reinstatement of previously vacated findings.

This argument is apparently based on Respondents' claim that the original certification decision, which was overturned on appeal in 1979, was somehow correct at the

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[7] Hill v. Western Elec. Co., 596 F.2d 99 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979).

time it was made (Brief in Opposition, at 17). This assertion has absolutely no substance. In the first *Hill* opinion, the Fourth Circuit held:

> Because no named plaintiff is a member of the excluded classes, we think the district court *improperly considered* the discrimination in hiring claims and the claim of discrimination against women in promotions in the Installation facility.
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> The interest of these named, employed plaintiffs in being free of discrimination in job assignments and in promotions is so different in kind from that of people who were denied any employment that the named plaintiffs may not properly maintain an action for redress of alleged discrimination in hiring. Under *Rodriguez*, certification of a class including victims of alleged hiring discrimination who never were employed by Western Electric *was in error*.

596 F.2d at 101-02 (emphasis added). The court thus did not hold that the original certification proceeding was correct, but that the district court's certification ruling was "in error" and the hiring claims were "improperly considered" at the time of trial.[8] Moreover, even the majority opinion below acknowledged that the initial proceeding was flawed, but concluded that these flaws were unimportant "technical" and "formal" matters. Had the majority below believed that the original trial properly included hiring claims, it could well have said so. Respondents' claim is simply an unsupported *post hoc* rationalization designed to justify an otherwise untenable position.

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[8] Respondents attempt to argue that the Fourth Circuit held that *Barnett v. W.T. Grant Co.*, 518 F.2d 543 (4th Cir. 1975) "arguably" authorized the original certification decision. Brief in Opposition at 3. In point of fact, the Fourth Circuit criticized the lower court's reliance upon *Barnett*, pointing out that *Barnett* was a limited opinion in which the named plaintiff had been allowed to represent only those persons seeking the same position that he sought. 596 F.2d at 101.

In similar fashion, Respondents' claim that this Court's decision in *Rodriguez* created a startling change in the law which justifies additional class certification proceedings is simply unfounded. The language of Rule 23 has remained unchanged since 1966, and surely this Court's ruling in *Rodriguez* that a named plaintiff must suffer the same injury and possess the same interest as class members is nothing new.[9] This Court's decision in *Rodriguez* was thus not a revelation or a change in direction, but a confirmation of existing law that the lower courts should have, and often did, apply in employment discrimination litigation.[10] *Rodriguez* represents the law that should have been applied initially in this case, not a new mysterious doctrine that took Respondents unaware.[11]

Finally, Respondents attempt to justify revisiting the class certification issues in this case by relying on several single litigant "real-party-in-interest" cases, such as *Mullaney v. Anderson*, 342 U.S. 415 (1952) and *Eklund*

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[9] Indeed, in *Rodriguez* this Court cited a substantial number of cases, as far back as *Bailey v. Patterson*, 369 U.S. 31 (1962), for this elementary proposition.

[10] Throughout this litigation, and most critically in the initial class certification, Petitioner opposed the named plaintiffs' attempt to represent rejected applicants because none of the named plaintiffs had been the victim of discrimination in hiring. Indeed, in the initial certification decision in this case, the district court refused to allow representation of rejected applicants on this very basis only to reverse itself *sua sponte* a short time later. Petition, at 2. Respondents' claim that *Rodriguez* was a revelation justifying new proceedings is thus disingenuous.

[11] Respondents' purported distinction of *City & County of Denver v. Matsch*, 635 F.2d 804 (10th Cir. 1980), *cert. denied*, 101 S. Ct. 3114 (1981) is thus without substance. The court there denied litigants who had failed to establish standing a second chance to do so in order to "save" a judgment on the merits, a course the Fourth Circuit should have followed in this case. *See* Petition, at 23-24.

v. Mora, 410 F.2d 731 (5th Cir. 1969).[12] These cases dealt solely with corresponding technical omissions in pleadings regarding single parties raising single claims, and involved situations where the proper party to the litigation was never before the court. By contrast, in this case proper parties—that is, the original named plaintiffs—were always before the court, and it was the scope of the claims that those parties could raise that was at issue under Rule 23. As *Falcon* makes clear, Rule 23's requirements are used to determine the scope and character of class litigation, based upon the injuries allegedly suffered by the named plaintiffs and the claims they have standing to raise. Class claims not "fairly encompassed within the named plaintiffs' claims,"[13] such as the hiring discrimination claims in this case, fall outside the scope of litigation sanctioned under both Rule 23 and Article III. The instant case thus does not involve one litigant merely stepping into the shoes of another, but one party stepping beyond the shoes of another to expand drastically the proper scope of the litigation. This is in no sense analogous to the "real-party-in-interest" cases that Respondents rely upon.

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[12] *Finn v. American Fire & Casualty Co.*, 207 F.2d 113 (5th Cir. 1953), *cert. denied*, 347 U.S. 912 (1954), also relied upon by both the majority below and the Respondents in their brief, simply does not address the issue raised in this case. *Finn* rests upon an ancient rule of pleading related solely to diversity cases, and merely holds that where the indispensable parties to the litigation are truly diverse, elimination of a dispensable party to create perfect diversity can be given retroactive effect. *Finn* thus was a case where the initial litigation was, but for the presence of an unnecessary party, properly conducted, a far cry from the present situation where it has been conclusively determined that the hiring claims were never properly before the court. Moreover, jurisdictional defects involving diversity do not involve important federal policies under Rule 23 nor Article III concerns. *See* Petition at 21-22, note 31.

[13] *General Tel. Co. of the Southwest v. Falcon*, 102 S. Ct. 2364, 2371 (1982) (*quoting General Tel. v. E.E.O.C.*, 446 U.S. 318, 330 (1980)).

III. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE WHICH SHOULD NOW BE CONSIDERED BY THIS COURT.

The issues raised in this case, contrary to Respondents' claims, are of exceptional importance because they arise repeatedly in class actions in all substantive areas of law. Respondents' claim that the opinion below will not generate spurious class actions because the district courts can be expected to follow *Falcon* and *Rodriguez* (Brief in Opposition, at 20) is unfounded. District courts, even assuming they attempt to follow *Rodriguez* and *Falcon*, are constantly required to exercise their judgment under Rule 23 in defining the scope of the litigation.[14] The commands of Rule 23 are plainly not self-executing, but rather require the exercise of judgment based upon the facts presented to the court. Whenever it is determined that the district court has erred, construed the scope of the litigation too broadly, and allowed trial of claims that should not have been presented, the opinion below would allow intervention to save favorable findings by parties who would not be bound by an adverse determination on the merits. This situation will arise whenever an appellate court finds that a lower court certified an overly broad class, simply because certification orders are not immediately appealable. This is, as noted above, exactly what has happened in *Brown, supra.*

Finally, Respondents have argued that review by this Court is inappropriate because the Fourth Circuit has ordered additional proceedings in which the Respondents may not succeed. (Brief in Opposition, at 22-23). The possibility of further proceedings in the lower courts has not prevented this Court from correcting evident errors in similar cases. Indeed, in *Falcon*, the merits of the hiring and promotion claims remained to be decided at the time this Court issued its opinion. 102 S. Ct. at 2369.

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[14] An apt example of this process is seen in *University of Houston v. Wilkins, supra*, where the court was called upon to decide whether the claims of the named plaintiffs were typical of persons working in different administrative units, and in different job classifications.

Just as the possibility that the plaintiff in *Falcon* might not have prevailed on the merits was no bar to this Court's consideration of that case, the possibility that Respondents may not prevail below should not prevent this Court from considering this case. This petition challenges the Fourth Circuit's reliance upon the improper possibility of reinstatement of findings that were void *ab initio* as an excuse to overturn the lower court's denial of intervention. It is to this error, and the majority's misreading of Rule 23, that the petition is addressed. Whether Respondents succeed in obtaining reinstatement of the vacated findings does not remedy the majority's basic error, which is the source of all further proceedings in this litigation.

CONCLUSION

Petitioner respectfully renews its request that this Court grant its Petition for a Writ of Certiorari and set this case for argument or, in the alternative, vacate and remand this case for further consideration in light of *Falcon*.

Respectfully submitted,

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